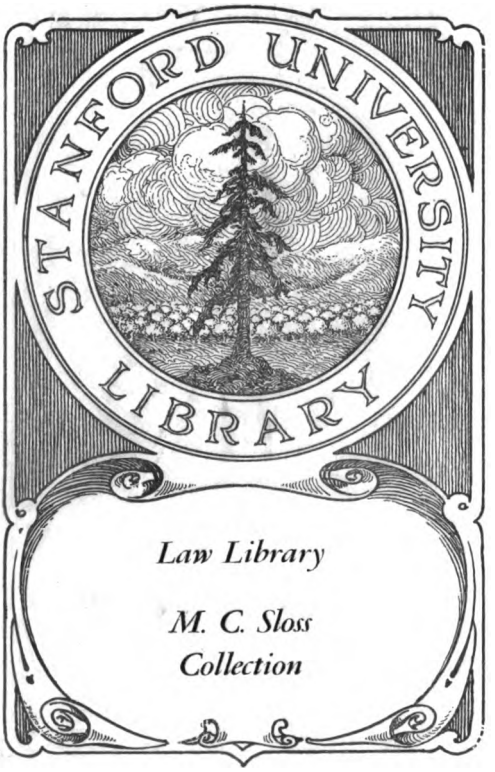

THE SOUTH AUSTRALIAN LAW REPORTS.

REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF SOUTH AUSTRALIA.

EDITED BY

J. W. DOWNER,

A PRACTITIONER OF THE SUPREME COURT.

VOL. IX.—1875.

ADELAIDE:
ANDREWS, THOMAS, & CLARK, PRINTERS,
GRENFELL-STREET.

1875.

JUDGES OF THE SUPREME COURT.

1875.

SIR RICHARD DAVIES HANSON . . . . . CHIEF JUSTICE.

EDWARD CASTRES GWYNNE, ESQ. . . . . SECOND JUDGE.

WILLIAM ALFRED WEARING ESQ. . . . . THIRD JUDGE.
Died February, 1875; succeeded by

RANDOLPH ISHAM STOW, ESQ. . . . . THIRD JUDGE.

Primary Judge in Equity:
EDWARD CASTRES GWYNNE, ESQ.

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THE

SOUTH AUSTRALIAN LAW REPORTS,

1875.

SUPREME COURT.

HANSON, C.J., GWYNNE, J.] [COMMON LAW.

19 MAY, 1875.

RANDALL v. TUXFORD.

NEW TRIAL.—Misdirection—Acquiescence by Counsel in Judge's direction—Estopped.

Where at the trial of an action Counsel have raised no objection to the direction of the presiding Judge on the law involved, they are estopped from afterwards objecting to the same where the Counsel for the other side have been led by such direction to frame their case in a manner different from that which they would otherwise have adopted, especially if such direction be in accordance with the opening to the jury of the Counsel so afterwards objecting.

RULE *nisi* for a new trial on the following grounds:—(1), Misdirection by the learned Judge, that the finding of the jury of negative fraud amounted to a verdict for the plaintiff; (2), wrongful admission of representations made by the defendant to other persons than the plaintiff, and not communicated to or acted upon

by the plaintiff; (3), the wrongful rejection of evidence of the prospectus of the Company as being part of the information on which the defendant acted, and the evidence of the defendant and Williams in contradiction of Dornwell and Jones; (4), verdict against evidence, and the weight of evidence.

The case was heard before the Chief Justice and a jury.

The action was for recovery of calls paid on shares on the Larrakeeyah Gold Mining Company, Limited, of which the defendant, as a promoter, had induced the plaintiff to become a member on the faith of certain false representations contained in the prospectus signed and published by the defendant. At the trial the Chief Justice directed the jury to find a verdict for the plaintiff if satisfied that the statements contained in the prospectus were false, and the defendant had not taken the proper means to satisfy himself that they were true. This direction was in exact accordance with the opening to the jury of defendant's counsel.

Way, Q.C., now moved that the rule be made absolute.

The *Attorney-General (Mann)* and *J. W. Downer* showed cause.—The direction of His Honor the Chief Justice, that if they believed the defendant had not reasonable and probable cause to believe in the truth of the prospectus, then they must give him a verdict for the plaintiff, having been made at the suggestion of the counsel for the apellant, they cannot come here to-day and object to it as a misdirection—

Robinson v. *Cook*, 6 Taunton, 336
Martin v. *G. N. Railway*, 16 C.B., 179
Haseldine v. *Grove*, 3 Q.B., 997
Greene and Others v. *Bateman*, L.R., 5 E. & I. App., 591.

Way, Q.C. and *Wigley*, in support of the rule.—There has been a common mistake on the part of both counsel and Judge, from which the defendant ought not to suffer—

Knight v. *Egerton*, 7 Ex., 407.

20 May—

Judgment was now delivered as follows:—

HANSON, C.J.—I have no hesitation in saying that defendant is precluded from taking this ground now. The course of the case in the Court below was this:—The learned counsel for the plaintiff opened by stating that he believed he should be able to show that the statements that had been made were not only false, but also false to the knowledge of the defendant. But he submitted that this latter point was strictly immaterial, for that whether they were false to his knowledge or not he was liable for any loss that might have resulted from such statements. And the learned counsel for the defendant, though he declined to accept this view of the case, said he would put it to the jury that if they believed the defendant had reasonable and probable cause for making the statements, then he must have a verdict; if not, that then there must be a verdict for the plaintiff. Before either party addressed the jury, though my opinion was already formed on what I considered the balance of authority, still I should have been prepared to hear argument on the point, and I invited argument, if such was thought necessary, as to the manner on which I should leave the case with the jury; and the direction I then gave was acquiesced in by both parties. On that there is no question; and there is no doubt that the defendant's counsel deliberately assented to what I said to be the law, but what is now alleged to be simply the law under a misapprehension. I think the parties must be bound by the view their counsel took during the course of the trial; and I think so particularly in this case, because by the view that was taken of the case it was not necessary that many of the facts of the case that would have materially affected the question of the defendant's *mala fides* should go to the jury. I don't pronounce any opinion as to what would then have been the finding of the jury, but I do say that to my mind there were a large number of circumstances pointing in that direction, though it is only fair to say that there were some circumstances pointing the other way. I say I do not wish to express any feeling as to what the finding of the jury would have been if those circumstances had been

brought before them; but I do say very strongly that there were circumstances pointing in that direction, and which circumstances were deliberately withdrawn from the consideration of the jury; and that being so on that part of the case, I put the case to the jury as favourably as a consistency with justice would admit on behalf of defendant; and under such circumstances it would, I say, be unjust that the defendant should be allowed to have the case tried by another jury. Then, as regards the action of the jury:—The jury, after retiring, returned to ask what was the effect of my direction. I told them that my direction was that if facts were false and a person represented them to be true without having taken the proper means to satisfy himself that they were true, that would amount to saying that he had not reasonable and probable cause for publishing the statements; and that further, such an absence of having satisfied himself, that he had such reasonable and probable cause, would amount to fraud. They said that they considered there was such an absence of reasonable and probable cause. I then said, "Then you find for the plaintiff?" The foreman of the jury replied, "Yes." Under these circumstances, both on the general principle and also in reference to the particular finding of the jury, I think the defendant is precluded from arguing the first ground of the rule. It would be most inconvenient if any rule should be adopted which would relieve counsel from being governed by the conduct they display in the course of the trial and in the issues they submit to the jury simply because they are discontented with the result. It is unnecessary for me to say anything in reference to the general facts of the case; but I may say—and I cannot put it stronger than this—that if I felt the direction I gave the jury to be wrong, and that I had omitted to put facts that were of importance to the defendant to the jury, then I would be in favour of the rule; but I cannot find anything in what has now been urged to convince me that it would be a matter of justice to the defendant to grant the rule. I must therefore rule that the defendant is estopped from arguing the point of misdirection.

GWYNNE, J.—I concur in the opinion that the defendant is

estopped from arguing the point of misdirection. I am very glad that I am not called upon to refer to the direction given at the trial by the Chief Justice, or to say whether it was good law or not. As I have already said, if I had tried the case I should have told the jury that the fact of a man putting his name to an instrument of this sort thereby warranted the truth of it, and he must take all the consequences that might flow from its publication. There are a great number of cases in support of this view. But I am not called upon to criticise the decision of the learned Chief Justice's direction for this reason—that he took the law as it was put by the learned counsel. Suppose that the matter had been the other way, that there had been a verdict for the defendant, would it be competent for the counsel for the plaintiff, who had been sitting listening to the way in which the case had been put to the jury without objecting, to have asked for a new trial? What would have been the position of plaintiff? Precisely that of the defendant. He would have consented to the direction of the Judge as being the law, and he would be bound by the throw of the die.

Rule discharged.

28 JUNE AND 28 JULY, 1875.

IN RE THE ADELAIDE WATERWORKS ACT.

DAVIS v. BAGOT.

ADELAIDE WATERWORKS ACT, 1863.—*Section* 58—*Agreement to supply water for "all purposes"—Meter—Estoppel—Right of Collector to sue.*

By an agreement made, or purporting to be made, pursuant to Section 58 *of the Adelaide Waterworks Act of* 1863, *the Commissioner of Waterworks agreed to supply water "for all purposes," such water to be paid for at a certain rate for every* 1,000 *gallons, as shown by the meter; the Commissioner further undertaking, on notice given by the defendant that such meter was out of repair, to repair the same, and to allow to the defendant, free of charge,* 1,000 *gallons for every* 1*s.* 6*d. of the water-rate levied in respect of defendant's premises.*

On action brought by the Collector for the Commissioners,

Held—per GWYNNE, J.—*That moneys payable under a special agreement are not such moneys as the Collector is empowered by Section* 76 *of the Act to sue for.*

2. *That the Commissioner had no power to enter into an agreement to supply water "for domestic and other purposes," but for "purposes other than domestic" only, and that the agreement was, therefore,* ultra vires.

3. *That though the defendant was estopped from disputing the correctness of the meter, he was not estopped from questioning the accuracy of the plaintiff's reading of the same.*

Per HANSON, C.J.—*That, in substance, the agreement distinguished between water to be used for "domestic" and that to be used "for other purposes," the allowance free of charge being the quantity assumed by the Act and the agreement to be that likely to be used for domestic purposes, and that the agreement was therefore within the meaning of the Act.*

2. *That the Collector was entitled to sue for same under Section* 76.

SPECIAL case from the Local Court of Adelaide.

The action was brought by the Collector of the Commissioner of Waterworks for £9 12s., for water shown by the meter to have

been supplied for domestic and other purposes to the defendant, pursuant to agreement purporting to be made under Section 58 of the Adelaide Waterworks Act, No. 15 of 1863, whereby the plaintiff agreed to supply the defendant with water "for all purposes."

The agreement provided that all water should be supplied through two meters to be provided by the Commissioner at a rental of 2s. a month; 2nd, that the defendant shall also pay 1s. 6d. for every 1,000 gallons as shown by the said meter, excepting that he should be entitled to have supplied to him free of charge every half-year during the continuance of such agreement the quantity of 1,000 gallons for every 1s. 6d. paid for the water-rate assessed upon his said premises. The plaintiff further undertook, on notice from the defendant that the meter was out of repair, to repair the same, but no such notice appeared to have been given. The defendant pleaded at the trial that he did not agree as alleged, denied the breaches, and asserted that the water was not supplied as alleged, and paid the sum of £1 4s. 5d. and costs into Court in satisfaction of all demands.

The questions for the decision of the Court were:—(1) Is it competent for the defendant to prove that the water actually supplied was less than that shown by the reading of the meter? (2) Are the moneys under the agreement moneys which the Collector can sue for under the Act? and (3) Is the defendant estopped from taking such objection? If the first question be decided in the affirmative, then a new trial to be had between the parties. If the second and third questions be answered in the affirmative, unless a new trial be ordered, then judgment to be entered for the plaintiff; if in the negative, then for the defendant.

J. W. Downer, for the defendant.—In the first place I shall argue that this agreement is against the policy of the law. The Waterworks Act, No. 15 of 1863, sets forth by Section 52 that the Commissioner may levy rates according to the scale therein

mentioned. Then Section 58 enables the Commissioner to levy special charges for water supplied for purposes other than domestic. (GWYNNE, J.—Under the Act, persons must pay the rate whether they use the water or not.) Yes. By Section 59 the Commissioner is entitled to charge 10s. for every head of cattle using water. Section 63 sets out how the Commissioner may recover rates, and Section 76 authorizes the collection and recovery of rates by the Collector. It will be seen by clause 58 of the Act that the Commissioner is empowered to make agreements for the supply of water for other than domestic purposes, and this agreement says "domestic and other purposes." What, then, is the result of the facts that are perfectly consistent with the agreement? Supposing all the water supplied to be used for domestic purposes, then the money recoverable from Mr. Bagot would be the water-rate, and an injustice would be done to the individual. Supposing, however, it was all used for the purposes of irrigation, then an injustice would be done to the revenue. The only agreement that the Commissioner is authorized to make is for the supply of water for purposes other than domestic, and any other agreement would be *ultra vires*, and null and void. Then, as regards the meters, I may observe that it was a condition precedent that they should be kept in proper order and repair by the Commissioner, and this he failed to do. Then, as regards the question of moneys, I would submit that these were not moneys that could be levied under the Act, and, therefore, could not be sued for by the Collector.

HANSON, C.J.—The moneys go with the agreement. If the agreement is under the Act, then the moneys under the agreement must be under the Act.

The *Attorney-General (Way, Q.C.)*, for the plaintiff.—I submit that the 58th clause fully permits the agreement that has been made. Put in the place of the Commissioner a private company; would they not have the right, while agreeing to give people water at a certain price, the power to make special agreements? The defendant must be bound by what is shown by the meters. He agrees to be so bound by the agreement, and the Commissioner

was only bound to keep the meters in repair on receipt of notice from the defendant. There would be an end to all business on the part of Water Companies and Gas Companies whose contracts are made entirely on what is shown by the meters, if these records could be dispensed with, and a person only had to pay for what he chose to say he had consumed.

Cur. ad. vult.

28 July—

Judgment herein was now delivered as follows:—

GWYNNE, J.—This was a special case sent up by the Special Magistrate of the Local Court of Adelaide, in which are proposed the three following questions for the opinion of this Court:—1st. Is it competent for the defendant to prove that the water actually supplied was less than that shown by the reading of the meter? 2nd. Are the moneys claimed under the agreement moneys which under the Waterworks Act can be sued for by the Collector? 3rd. Is the defendant estopped from raising that objection? I assume that the defendant was bound by the meter, but it does not thence follow that he was bound by the readings of it deposed to by the plaintiff's witnesses. The case is analogous to that of a lost or destroyed deed. There the contents of the deed may be proved by verbal evidence; but undoubtedly the evidence of the one side as to the contents of the deed may be contradicted as to those contents by verbal evidence on the other side. And it appears to me by parity of reasoning that it was competent in the case before us for the defendant to have shown by verbal evidence that the quantity of water which the plaintiff's witnesses, relying solely on the correctness of their reading of the meter, deposed to as having been delivered was not in fact delivered, and this not for the purpose of disputing the correctness of the meter, but for the purpose of proving that the meter was incorrectly read by the plaintiff's witnesses. Under the circumstances of the case, I think both sides were estopped from questioning the correctness of the meter in itself. Assuming, then, that this machine acted properly

and in truth revealed the actual quantity of water supplied, but that the defendant did not receive so large a quantity as that deposed to by the plaintiff's witnesses, it follows necessarily that their readings of the meter were erroneous. I therefore think the evidence, although indirect or circumstantial, ought to have been received; but what effect it would have had on the mind of the Court is another thing altogether. As respects the second question, I do not think the Legislature intended by the 58th section of the Act to authorize the Commissioner to make any special agreement which would interfere with a citizen's *status* of a ratepayer. By the agreement on which this action was brought, that *status* is absolutely destroyed. How, after such an agreement, could the defendant be proceeded against under the 32nd section of the Act for wasting the water? His answer to such a charge or to any other under the punitary clauses would be, "I have bought the water, and I may use it as I think proper, and even waste it if I like." I am disposed to think also that the agreement is too general; no purpose for the use of the water is defined by it—the defendant by its terms might have used any quantity of water, and that for any purpose whatever. I have for the above reasons come to the conclusion that the agreement is contrary to the policy of the Waterworks Act—is *ultra vires* of the Commissioner—and therefore invalid. It seems to me, moreover, that the words in the 76th section, "or other moneys payable under the provisions of this Act," mean moneys payable under the Act immediately, not circuitously, and do not embrace moneys payable under a special agreement with the Commissioner any more than to moneys due as the purchase-money of land taken for the purposes of the Act by virtue of the Lands Clauses Consolidation Act, and not required for the Waterworks, but afterwards sold by the Commissioner. I do not overlook the use of the words "or other moneys" in the 76th section, but those words mean moneys *ejusdem generis* with rates and assessments; for instance, moneys payable in respect of horses, cattle, and carriages under the 56th section. I think therefore that the Collector could not sue upon the agreement relied on by the plaintiffs. I do not see any ground of estoppel which should prevent the defendant from raising the question of the competency

of the nominal plaintiff. I answer the first question, with the modification I have above put upon it, in the affirmative, and the other two in the negative.

HANSON, C.J.—This is a case stated by the Local Court of Adelaide. The plaintiff sues, as a Collector duly appointed for that purpose, under the Adelaide Waterworks Act, 1863, and he seeks to recover from the defendant moneys alleged to be due under agreements made between the defendant and the Commissioner of the Adelaide Waterworks. By the Adelaide Waterworks Act, Section 52 and the following sections, the Commissioner is authorized to levy rates upon certain terms, and by Sections 23 and 24 he is bound, in effect, to supply water for domestic purposes to all premises, the owners or occupiers of which are liable to be rated; but by Section 58 no person is authorized to use any part of the water so supplied for any other than domestic and building purposes, excepting under a written agreement with the Commissioner, which is to fix the payment to be made therefor. The effect of the Act is, consequently, that the rates levied entitle the owner or occupier of premises to a supply of water for domestic purposes, but he is forbidden to employ the water so supplied for any other purposes, excepting the temporary and occasional purpose of building, unless by special agreement, which fixes the rate of payment. Under these circumstances an agreement was entered into in the year 1870 between the plaintiff and the Commissioner, by which it was agreed that all the water to be supplied to the defendant for all purposes whatever should be supplied through a meter, and that in addition to the rates levied by the Commissioner the defendant should pay at the rate of 1s. 6d. for every 1,000 gallons "which, according to the said meter," should be supplied to him; but that the defendant should be allowed, free of charge, 1,000 gallons in every half-year for every 2s. of the amount of the rate paid in respect of his premises. In June, 1873, a fresh agreement was made, substantially the same as the first, excepting that the defendant was to be allowed, free of charge, 1,000 gallons for every 1s. 6d. of the rates paid by him, instead of for every 2s. These agreements were proved, and then

evidence was given of the quantity of water supplied according to the meter, which would entitle the plaintiff to recover the amount claimed in the action. It was then proposed to offer evidence on the part of the defendant to show that the amount of water shown by the meter was not in fact supplied, which evidence was rejected by the Commissioner, and then a nonsuit was moved for on the ground that the agreement was not contemplated by the Act, and that consequently the plaintiff was not entitled to sue under it. The Commissioner overruled the objection, but, at the request of the defendant, consented to state a case for the opinion of this Court. On the argument it was contended that the agreement not being confined to the special object of the 58th section, but including water used for domestic as well as for other purposes, was not authorized by the Statute; but it appears clear that in substance the agreement is intended to distinguish between the two, and does so in the only way that could be effectual in the absence of constant supervision. It is obviously assumed between the parties, as it is assumed by the Act, that the rate is a measure of the value of the water likely to be used for domestic purposes; and that the defendant, who is compelled to pay the rate, and entitled to be supplied with water for those purposes, would receive in the use of the water for these purposes an adequate compensation for the rate. But as in practice there would be a very great difficulty, amounting almost to an impossibility, of distinguishing between the two uses, this is met by having one mode of supply for both so arranged as that the whole amount used might be ascertained, and allowing out of the price fixed a deduction equivalent to the amount of the rate for which defendant was liable. As, therefore, domestic purposes are included in "all purposes," the defendant, who is allowed to use water for these to the full amount of the rate, is not injured. And there is no limit of the Commissioner as to the rates he should charge and the terms he should fix in any agreement for the use of water for other than domestic purposes, so as to entitle this Court to say that he was guilty of any dereliction of duty which should invalidate the agreement. I am therefore of opinion that the agreement was within the scope of the Act, and therefore one which the

Commissioner was entitled to make, and upon which the plaintiff can sue. The second point, whether the defendant could offer evidence to show that the reading of the meter was wrong, was practically almost abandoned by the defendant, since he rested his argument upon an assumed obligation on the part of the Commissioner to keep the meter in repair. It is not necessary to enquire what would be the effect of such a stipulation, since on reference to the agreement the obligation of the Commissioner (if any) is dependent upon notice being given by the defendant that the meter was out of repair, which notice he is bound to give, but which it is not pretended was ever given. My learned colleague the Primary Judge, however, expressed doubts as to the effect of the language of the agreement, appearing to think that it was to be read as though the thing to be paid for was the water actually supplied, and that therefore, though the meter was strong *prima facie* evidence, it was nevertheless open to contradiction. But according to my reading of the agreement, although the thing to be paid for is undoubtedly water to be supplied by the Commissioner, yet the real consideration to be paid for by the defendant is the liberty to use that water for all purposes, and the consideration for the grant of this liberty is the promise of the defendant that he will pay for such water according, not to the quantity of water which should be actually supplied, but which according to the said meter should be supplied to him. And when an agreement of this sort is made between fully competent persons the Court cannot, I imagine, step in and make a new contract for them. In building contracts, where payment is made to depend upon the certificate of a third person, the Court only interferes in case of fraud or *mala fides*, and there is no suggestion of either in the present case; and this being so, the language of the agreement must be taken as the final measure of the rights and liabilities of both of the parties. I am therefore of opinion that the first question should be answered in the negative and the second question in the affirmative, so that the third question is immaterial.

HANSON, C.J., GWYNNE, J.] [COMMON LAW.

8 JULY, 1875.

THE BURRAWING COPPER MINING COMPANY, LIMITED, v. HARVEY.

COMPANY.—Articles of Association—Memorandum of Association—Preferential Shares.

Section 6 of the Articles of Association of a Company empowered the Directors, if authorized by special resolution as therein mentioned so to do, to increase the capital of the Company by the issue of shares giving a right to preferential dividends over such capital. Section 56 of the same Articles provided that dividends should be divided pro rata *amongst the shareholders.*

The Memorandum of Association was silent on the subject of preferential shares.

On action for calls due on preferential shares issued pursuant to Section 6—

Held—*That the issue of such shares was not* ultra vires; *and that the defendant was not entitled to a nonsuit on that ground; and that Sections 6 and 56 of the Articles were not inconsistent.*

RULE *nisi*, calling upon the defendant to show cause why the nonsuit should not be set aside and a new trial granted.

The action, which was tried in the Local Court of Adelaide, was for £31 5s., amount of a call of five shillings per share on 125 preferential shares; and a nonsuit was entered on the ground that the Directors had no power to issue preferential shares, their Memorandum of Association being silent on the subject; and such preferential right being inconsistent with the clause of the Articles providing for apportionment of dividends.

The ground relied on in the rule was that the Directors had such power.

The 6th section of the Articles of Association empowered the Directors to increase the capital of the Company by the issue of shares giving a preferential right over such capital.

The 56th section provided that dividends should be apportioned rateably amongst the shareholders.

The Memorandum of Association contained no reference to preferential shares.

The Attorney-General (Way, Q.C.) now moved that the rule be made absolute. Since the rule was obtained there have been two decisions in England strongly bearing upon this case. The first of the cases is

Harrison v. *Mexican Railway Company*, 32 L.T., N.S., 82.

The Articles of Association of the Company were almost similar to those in issue; and the Master of the Rolls decided that the Directors could increase the capital of the Company either by preferential shares or bonds. The second case was that of

The Bangor and Port Madoc Slate and Quarry Company,

mentioned in the *Weekly Notes* that arrived by last mail (May, 1875), p. 81, which followed the decision in the previous case, and declared the preferential shareholders were entitled to participate in the distribution of dividends. Then I think clause 6 of the Articles comes within the decision in

Hutton v. *Scarborough Cliff Hotel Company (Limited)*, 2 Drew & S., 514-521; 13 W.R., 631,

wherein it was laid down that when the Articles of Association point out that preference shares are to be of equal value with other shares they will have equal privileges, unless that inference were rebutted by the statement of the Articles of Association.

Barlow.—The case

Harrison v. *Mexican Railway Company*

is distinguishable from the one before the Court. Article 56 of the Articles of Association by its wording directly rebuts the inference that preferential shareholders are to be entitled to dividends, as it says that the dividends are to be made *pro rata*. Sir George JESSEL, the Master of Rolls, in giving judgment in

Harrison v. *Mexican Railway Company*,

said he felt himself completely bound by the decision given in

Hutton v. *Scarborough Cliff Hotel Company*.

By implication, article 56 says that no preference shares could be created unless the terms of the article were altered in the manner provided for by the Articles and Memorandum. (The *Attorney-General*.—The question is, can these shares be created, and not what are the rights that can be enjoyed under them.) No doubt the Company had a power if exercised in a proper manner; but if not so exercised, and that illegality were not acquiesced in, then the preference shares have not, and never had, any existence. But even if the shares were issued, the defendant never got preference shares. He applied for shares in the terms of the resolution, and he obtained shares in the terms of the Articles of Association. On such shares he could not obtain a dividend, as the dissentient shareholders could step in and restrain the Company from paying such a divdend so long as the clause remained unaltered. (GWYNNE, J.—You don't suggest that the Directors acted *ultra vires?)* I contend that they acted illegally. (GWYNNE, J.—But Directors are special agents—at least that is the current opinion—and can only do things which the Company have authorized. They are not general agents, but simply special agents who have their power expressly vested and defined. Now, here their powers were to make this addition to the capital by means of 6,500 preferential shares of £1 each; and the only question is, what is the division of the dividends under this new state of things, and whether it is to be given to both in equal proportions.) I think the question rather is whether the Company could give such a

power without the alteration of Section 56. Even unanimity would not bind the Company if the decision arrived at was contrary to the provisions of the Act of Parliament. Now, the 12th section of the Companies Act says the Articles of Association shall not be altered, except in the particular way specified by the Articles. That, I submit, has not been done, and therefore no assent could be good. Further, it is said that the Articles of Association must give way to the Memorandum when the two are inconsistent. And in the Memorandum of Association the creation of preference shares is not contemplated—

Hutton v. *Scarborough Cliff Hotel Company (Limited)*, ante.

(HANSON, C.J.—There was no provision for preference shares in that case in the Articles of Association.) (GWYNNE, J.—And the objection was taken before liquidation.) I would refer your Honors to

Bank of Hindostan v. *Alison*, L.R., 6 C.P., 222
Melkado v. *Hamilton*, 28 L.T., N.S., 578.

(HANSON, C.J.—The latter case is, I think, hardly applicable.) (GWYNNE, J.—I think in saying that because certain ceremonials are observed you can bind all parties is stating the law a little too broadly. No doubt you can in such way bind all those who acquiesce and benefit by the acquiescence, however great may be the departure from the original undertaking; but it cannot bind those who do not acquiesce.) All I contend for is that only an informality can be waived by acquiescence—

Lord Westbury's remarks, *ex parte* Grady, *in re* British Provident Fire and Life Assurance Company, 1 DeGex, J. & S., 488.

If he be a shareholder they must show it—

Lindley, vol. 2, p. 1381.

The resolution was never properly carried.

HANSON, C.J.—That point was not taken in the Court below, and therefore cannot now be raised.

Attorney-General (Way, Q.C.)—It has never been denied, either under the old or new Companies Acts, that the capital can be increased by one resolution. That principle has been affirmed in this Court—

The Yam Creek Gold Mining Company v. *Wadham*, 8 S.A.L.R., 141,

and many others. The dictum of Chief Baron KELLY in the case of the

Bank of Hindostan v. *Alison* (ante)

has been overruled—

In re Bank of Hindostan, China, and Japan—*Campbell's* Case, L.R., 9 Ch., 1.

One resolution only is necessary to increase the capital of a Company. In the case of

Melhado v. *Hamilton*, on appeal, 29 L.T., N.S., 364,

the Lord Justices of Appeal took the same view as did the Master of the Rolls, and considered themselves bound by the

Hutton v. *Scarborough Cliff Hotel Company (Limited)*, ante

case. (GWYNNE, J.—I have been reading Section 6 attentively, and I see that it completely overrides Section 56, and that the Directors have the power to do as they have done without any

reference to the latter section.) The decision of the Master of Rolls in

Harrison v. *Mexican Railway Company* (ante)

supports that view of the case.

HANSON, C.J.—It appears quite clear that in this case, according to the Articles, the Directors have the power to issue shares giving a right to preferential dividends over the capital of the Company. It is true that the Memorandum of Association is silent in regard to that, and the decision of the Special Magistrate appears to have proceeded on the ground that it was incompetent for the Directors of the Company, by the Articles of Association, to enlarge the powers given by the original Memorandum; but I am not aware of any authority in support of that proposition. No authority has been cited by the learned counsel for the respondent. All the authorities, so far as I know them, concur in giving the power to enlarge the capital of a Company by the issue of these preferential shares. In all the cases cited by the learned counsel the power to increase the capital is absent from the Articles, but in this case the power is expressly given; and I am not aware of anything which says the effect of the Articles in that respect is limited by the terms of the original Memorandum; and as the Articles themselves show that that power may be conferred, I am of opinion that the shares were properly issued, that the nonsuit was wrong, and that therefore there must be a new trial.

GWYNNE, J.—I concur in that opinion. The learned counsel for the respondent has said that in issuing these shares they ought to have altered section 56 of the Articles of Association. Now, if they had taken a pen and struck out these words, or had altered them to meet the new state of things, and to meet the creation of these preferential shares, I should say that was no use. But what they have not done physically or actually they have done intellectually. They have altered the Articles intellectually by an effort of the exercise of the power given them by Article 6, which section

gives them the power to create these preferential shares, and to ensure to persons holding them the right to be paid dividends before the other shareholders—a provision which seems to me to secure to them the very desideratum claimed by the learned counsel for the respondents. Article 56, he says, should have been altered, and I think they have intellectually altered it, having imported into it by this resolution section 6. I think therefore that the case falls.

Rule absolute.

HANSON, C.J., GWYNNE, J., STOW, J.] [COMMON LAW.

28 JULY, 1875.

BUNDEY v. BOND.

APPEAL.—Contract—Time for payment—Receipt of Bill of Exchange.

A contract was entered into for the sale and purchase of stone at a certain price per foot. The contract was contained in certain letters, in which no mention was made of the mode or time of payment. Portion of the stone having been delivered, the plaintiff wrote to the defendant for a payment on account. In reply, the defendant sent plaintiff a bill, "hoping that it would suit," and a few weeks later wrote, stating that he presumed, from the fact of not having heard from the plaintiff, that the latter had succeeded in discounting the bill. As a matter of fact, the plaintiff had not so succeeded, but did not return the bill to the defendant.

On action by the plaintiff for the portion of the stone delivered and in respect of which the bill had been given—

Held—*That there was evidence—*

1. *That the stone was to be paid for on delivery.*
2. *That the plaintiff had received the bill not in payment, but for discount.*

Held, also—*That the above were questions of fact, not of law, and therefore for decision by the Court below.*

RULE *nisi*, calling on the plaintiff to show cause why the verdict should not be set aside, and a new trial granted on the ground that the contract was an entire one, and could not be sued for in part, and that the bill not having been returned, there had been an acceptance in satisfaction, and payment on account of the debt.

The facts, as set out in a special case stated by the presiding Magistrate of the Local Court of Adelaide, before which the case was tried, were substantially as set out in the headnote, and at the trial a verdict was given for £64, subject to a case reserved.

Ingleby now moved that the rule be made absolute.

The *Attorney-General (Way, Q.C.)*—The contract was completed.

There is nothing in the evidence to show that it was not completed; and therefore the defendant is not entitled to judgment even upon his plea. The terms of the contract may be gathered from what subsequently took place, and from the conduct of the parties. There is nothing in the contract to show whether the goods sold were to be paid for when the contract was completed, or whether they were to be paid for during delivery—the letters of the defendant seem to indicate the latter supposition to be correct—and the Court below had sufficient before them to infer that such was the contract between the parties. In his first letter the defendant enclosed an acceptance for the price of the stone, together with Bank interest, and hoped that it would suit. In his last letter he still assumed an apologetic tone; and now where does he deny his obligation to pay cash? Then, as regards the point that the defendant could not be called upon to pay for a portion of his contract, I would point out that such is not the case. He can obtain payment on a *quantum meruit*, the time for delivery having expired. And I submit that that would be the position of the plaintiff. He would be entitled to sue under a *quantum meruit*.

Oxendale v. *Wetherell*, 9 B. & C., 386,

cited by my learned friend when he obtained his rule, does not touch the present issue. The defendant, to plead that this was part of an entire contract, must show that he was ready to carry out his part of the bargain. (STOW, J.—There is no evidence that he was in a position to do so. Indeed, the evidence is, "I have no ready money until I obtain the certificate of the Engineer-in-Chief." That is practically an admission that he could not pay his way.) There is nothing to show it was not six loads that were to be delivered, and the matter was never disputed until the ingenuity of the defendant's counsel suggested that he was not to pay for the sixty-one yards of stone. (GWYNNE, J.—You mean that the defendant must have brought his cross action for the balance of the contract?) Yes. The case

Huxley v. *Bull*, 13 L.J., N.S., C.P., 217,

merely decides that it is an immaterial averment to state whether a bill of exchange would be returned unless returned before the action was brought. (GWYNNE, J.—And the bill has not been returned up to the present moment. It was received, but not accepted, because it could not be discounted at a particular Bank.) That is so; and to make it pass as an acceptance in satisfaction or as payment on account of debt, it must be discountable. The plaintiff is entitled to money, and he is offered a bill; and unless the bill can be discounted it cannot be considered as payment. And this the defendant clearly recognised. (HANSON, C.J.—Is there conclusive evidence on that point?) The defendant, when he sends the bill, writes a letter, in which he expresses a hope "that it will suit." (STOW, J.—That, I should say, means that he hoped it could be discounted.) Certainly. My learned friend seems to fancy that there is not conclusive evidence that the bill could not be discounted: but it was not the duty of the plaintiff to try and see whether the bill could be discounted. If it had been, before refusing the bill he would have had to try every banker and bill-discounter that exists in Adelaide. And what, I would ask, constitutes an acceptance in satisfaction? It must be nothing less than an act of will on the part of the acceptor—

Hardman v. *Bellhouse*, 9 M. & W., 596.

(GWYNNE, J.—Suppose the bill had been discounted, would not the plaintiff have made it his own?) Yes, because then he would have received the money. I would, however, point out that before a bill can be discounted, the person discounting it must make it his own, and there is no evidence that the plaintiff ever did make it his own. On these grounds I submit the rule must be discharged.

HANSON, C.J.—Is there anything, *Mr. Ingleby*, to show that the stone was not to be paid for on delivery? The agreement is silent on the point of payment, and we have therefore to gather from the conduct of the parties what was settled between them.

GWYNNE, J.—It is surprising to me that the case of *Reynolds* v.

Withers has not been cited, as that was a case arising out of an agreement to pay for hay at so much a load. In this case the stone was to be paid for by the foot. Now, we know by experience, near enough for all general purposes, what constitutes a load of hay, but I, at least, don't know what a load of stone would be.

Ingleby.—No doubt they are speaking colloquially when they refer to "loads;" but I venture to submit that taking the whole of the agreement together, it is clear that the contract has not been completed, and that the plaintiff had to supply something more than he had done when he claimed the money. (HANSON, C.J.—There is nothing to show that the six loads would not equal the 132 yards of stone.) No, but the real point of the case is connected with the bill of exchange. A person who sends a bill of exchange to another must draw and endorse it so that it may be discounted. If the bill had been returned to the defendant, which it has not, it must have been returned in the same state in which it was sent. It must be returned without alteration. Up to the present moment the plaintiff has not returned it, and it may be, for all the defendant knows, in the hands of third parties; and if such be the case, then by the result of this action he would have to pay Mr. Bundey for the stone, and by a subsequent action he would be compelled to pay some one else the amount of the bill. It is the duty of any person to whom a bill of exchange is sent, if he does not choose to receive it, to return it—

Huxley v. *Bull* (ante).

(STOW. J.—In that case the bill was returned to prevent a ratification of an assumed agency.) The case did not, however turn on that point.

HANSON, C.J.—It appears to me to be entirely a question of fact even as put on the part of the defendant. Was this bill accepted in satisfaction, or in payment on account of the debt, is purely a question of fact on which the Special Magistrate was quite competent to arrive at a conclusion. The argument is that

the weight of evidence was such that it ought to have satisfied the Magistrate that it was so accepted. Even if we are of that opinion, we cannot interfere to say that the decision of the Special Magistrate was wrong; but I may go so far as to say that I think the decision of the Special Magistrate was right. By the admission of the defendant himself the plaintiff was entitled to payment in cash, and he sends this bill with a hope that it will suit; and on a further occasion he writes—"Not having heard from you again, I hope you have been able to get it discounted. If not, let me know." It is impossible to show more strongly that the defendant understood that the plaintiff did not intend to take the bill in satisfaction of his claim. I am therefore of opinion that the rule must be discharged.

GWYNNE, J.—This is an appeal from the Local Court of Adelaide upon a question of fact, and not of law. I am very strongly impressed with the view taken by *Mr. Ingleby* that the bill was accepted. Still, the defendant was bound to pay cash. He admits that he is not in a position to pay cash now, and that is an admission that the plaintiff ought to have had cash. That idea seems to vibrate through the whole transaction. This hoping that the plaintiff will accept this bill instead of cash, and that it will suit his purposes, means that he hoped he could get cash by the ordinary means; and by his writing again to enquire whether it had been discounted, would assume that he considered it was not an acceptance binding upon the party to whom it was sent. Such being my opinion, I do not know that I should have agreed with the Special Magistrate in his decision. I do, however, agree that the rule should be discharged.

STOW, J.—This is an action brought for the purpose of recovering the price of certain stone admitted to have been delivered by the plaintiff to the defendant, and at the price stated in the plaint. The objections to the finding of the Court below in favour of the plaintiff are two—firstly, that there was an entire contract for the delivery of a larger quantity of stone than had been delivered, which did not appear to have been determined; secondly, that a bill of exchange had been taken in satisfaction, or as a payment on

account. As regards the first point, there appears to be no written contract between the parties; but there are letters referring to the quantity of stone which the defendant would require, but neither the price nor the mode of payment is mentioned, and therefore the price and the mode of payment are to be gathered from a consideration of a conversation between the parties prior to the letters, from the letters themselves, and the conduct of the parties subsequently. I must say that if I had been asked to determine this case, I should have construed the meaning of the contract to be that the stone should be paid for as delivered. On that point there is evidence from which it would have been competent for the Court below to have said that such was the true construction of the contract. As regards the second point, the defendant, it appears, sends an acceptance of his own, which he asks the plaintiff to take in lieu of cash, and hopes that it will suit him. Then the plaintiff draws and endorses it, and *Mr. Ingleby* says that that is evidence that the bill was accepted by the plaintiff. Well, a jury or a Court like the Court below, having the functions of a jury, might on the evidence come to such a conclusion, but it is not certain that they would, and I must say that such a conclusion would be one contrary very much to the weight of evidence. What other meaning can be put on the words "hope that it will suit" than that the defendant hoped the plaintiff would be able to get money for it, and that he would go into the money market and get money? It appears it didn't suit him; and then the defendant writes again, two or three weeks after, and supposes that from having heard nothing more that he got it discounted. It must be supposed that the Special Magistrate gave due weight to all the considerations that might be suggested by the facts, and if I had been in his place I do not see how I could have arrived at any other decision. There was evidence from which it was perfectly competent for the Special Magistrate to come to a conclusion that this acceptance was not taken in satisfaction, or as a payment on account, and any other conclusion would, I think, have been against the weight of evidence. I concur in thinking the rule must be discharged.

Rule discharged.

GWYNNE, J., PRIMARY JUDGE.] [EQUITY.

20 JULY AND 3 AUGUST, 1875.

VAN DAMME v. BLOXAM.

REAL PROPERTY ACT, 1861.—*Mortgage—Notice—Specific Performance—Damages.*

A mortgage of land under the provisions of the Real Property Act of 1861 *provided that it should be lawful for the mortgagee to sell the mortgaged land on default "without serving me (the mortgagor) with any written demand for payment."*

A subsequent clause provided that all notices which, by virtue of the Real Property Act of 1861, *whether in respect of the payment of any money or otherwise, would require to be served by the said mortgagee on me at my last known or usual place of abode in this province, shall be deemed to be duly served by sending to me through the Post Office a letter addressed to me at Mount Gambier."*

The land having been sold without giving the notice provided by Section 52 *of the Real Property Act of* 1861,

On Bill filed by the mortgagor, praying that the sale and transfer might be set aside, or for damages,

Held—*That the mortgage did not dispense with the necessity of giving the notices required by the Real Property Act, but only with the mode of giving them there provided; and that the sale was therefore improper, but that the transferee was protected by the Real Property Act as a* bonâ fide *purchaser.*

That the Bill, showing no claim to equitable relief, irrespective of the question of damages, the Court of Equity would not entertain that question.

DEMURRER to a Bill of Complaint praying that the plaintiff might be put in possession of certain land, or the defendant ordered to re-sell to him, or that an account be taken of the value of the premises and the loss the plaintiff had sustained through being deprived of the same.

The bill set out that on the 29th February, 1869, the plaintiff obtained a lease of certain property with a right of purchase for £425, and that a short while afterwards he mortgaged the same under the Real Property Act to Messrs. Burton & Bloxam,

solicitors and money scriveners, at Mount Gambier, who advanced him money belonging to a Mr. W. F. Mordaunt, a resident in England. The plaintiff spent about £1,000 in improvements from time to time, and also paid his interest up till May, 1871. Default having been made in payment of the interest, the defendant proceeded to sell without notice as required by the Real Property Act of 1861. Before sale, the plaintiff tendered the arrears of interest; but the mortgage provided that in default, the principal should also become due. The provisions in the agreement material to the issues are set out in the judgment. The bill alleged that the sale was harsh and oppressive, and that as regards the plaintiff, it was fraudulent and void. To this the defendant demurred on the ground of want of equity and want of parties.

Ingleby, Q.C., in support of the demurrer.—The plaintiff wants simply something the Court cannot grant. He asks that he may be permitted to re-purchase the property, when heaven only knows who may be the vendor. As regards the question of oppressiveness and harshness, a sale can only be deemed oppressive when it is done to benefit the vendor, or with some ulterior motive—

Matthie v. *Edwards*, 16 L.J., N.S., Eq., 405; 11 Jur. 761.

Now in this case there is not a single allegation that there was any reason or motive for the sale. It was not to benefit anybody, but to obtain a security for the money that had been lent. If the plaintiff alleges that the defendant has treated him with harshness and oppression, he ought to state the facts and circumstances in which such harshness and oppression seem to exist—

Daniel's Chancery Practice, Vol. 1, p. 176.

The tender of the interest was not sufficient, as the deed says, that whenever there should be default in the payment of interest, the principal became due; and to prevent a sale, an undertaking would also have had to have been given of any reasonable costs that

might have been incurred. Under the Real Property Act the purchaser acquires an indefeasible title, which cannot be assailed by the mortgagor after the sale has taken place; at any rate the legal estate cannot be revealed. What is alleged to have taken place here, that the mortgagees sold without due notice, was a common occurrence under the old state of things. There can be no bill for a breach of covenant and a specific performance, and the matter therefore resolves itself into a question of damages, and on that point this Court is not the proper tribunal to which to come—

Clifford v. *Brooke*, 13 Vesy, jun., 131.
Newham v. *May*, 13 Price's Reports, 749.

The mortgage under the Real Property Act can be made either in the form provided for by the Act, or as a lawyer may see fit to draw it up.

Boucaut, Q.C., for the defendant (*contra*).—The powers of the deed merely say that for the purposes of convenience the personal demands required by Sections 53 and 54 of the Real Property Act shall be made in writing, and by being posted at the General Post Office; but that is no waiver of the notices being required. The cases cited by my learned friend are inapplicable, as since the decisions were given an Imperial and a local Act has been passed on the subject. The Imperial Act says the damages may be given "in addition to or in substitution of an injunction for a specific performance;" while the Colonial Act goes much further, and says "in any case where relief may be prayed." Damages have been given by Equity Courts in England—

Oakley v. *Ramsay*, 27 L.T., N.S., 745
Wilson v. *The Northampton and Banbury Junction Railway Company*, 30 L.T., N.S., 147.

Ingleby, Q.C., in reply.—In the case of

Oakley v. *Ramsay* (ante),

damages were given before the time for specific performance expired—between the time of filing the bill and the date of hearing. I contend that the plaintiff is not entitled to any measure of relief whatever.

Cur. ad. vult.

3 August—

GWYNNE, P.J., now delivered judgment as follows:—

This was a demurrer to the plaintiff's bill for want of equity. The two questions raised on the argument were—Firstly, Was the plaintiff entitled to any, and if so what, written notice from the defendant of his intention to sell the mortgaged property? Secondly, Was it competent for this Court to award to the plaintiff, on the case made by his bill, damages under Section 141 of the Equity Act, 1866. The land and premises mortgaged were under the Real Property Act of 1861, and that Act in Section 52 and the following sections prescribes the manner in which land so circumstanced is to be mortgaged. A mortgage is effected thus:—The mortgagor is required to execute a memorandum of mortgage in the form prescribed by Schedule F annexed to the Act. The form itself is silent as respects any power of sale, but such power is by force of the Act made of the nature of the contract of mortgage—that is to say, such power is included in the contract of mortgage by operation of law without being expressed therein. Now, looking at Sections 53 and 54, it will be seen that it is a condition precedent to the statutory power of sale thereby given that the mortgage-money shall, firstly, be in arrear and unpaid for the space of one calendar month; and that then, secondly, the mortgagee shall give to the mortgagor a written notice of his intention to sell, so that there must be a default for two calendar months at least, unless, indeed, the memorandum of mortgage expressly limit some other period of time. Now, if this case were to be disposed of under a compact of mortgage conceived in the form F, and which did not expressly limit any other period than the two months prescribed by the Act, it is quite clear—the statutory notice not having been given—that the power of sale never arose. But the

memorandum of mortgage executed by the plaintiff in this case, and which is dated the 25th February, 1869, although substantially in the form prescribed by the Real Property Act, contains some special and peculiar provisions. In the first place, it contains an express power of sale in these words—"And I empower the said mortgagee, his executors, administrators, or assigns, to sell the estate and interest hereby pledged to him by way of security by private sale or public auction whenever I shall make default in payment of the said principal or interest, or any part thereof, without serving me with any written demand for payment of such moneys." And then it goes on thus—"And I agree that all notices which by virtue of the Real Property Act of 1861, whether in respect of the payment of any money due upon this security, or for , would be required to be served by the said mortgagee upon me, or at my usual or last known place of residence in this province, shall be deemed to be duly served by sending to me through the Post-Office a letter addressed to me at Mount Gambier." It was argued on the part of the defendant that the effect of these two special clauses of the memorandum of mortgage dispensed with each of the two periods of one calendar month contemplated by the Act, and vested in the defendant the power of sale immediately upon default, and that without a written demand of payment, or notice of his intention to sell. But it appears to me that the only effect of the two special clauses was to dispense with personal service of the written notice upon the defendant, and to substitute for personal service a notice sent through the Post-Office. The latter clause mentions notices required by the Act, and in respect to the payment of money due on the security, and does not by expression or implication limit the period of time required by the Act to elapse before the right to sell arises. The requirement to send through the Post-Office has no appropriate subject if the notice of intention to sell is rejected in the construction of the clause. I think that notwithstanding the special clauses, the statutory notice should have been given, and that therefore the power of sale was improperly exercised, due notice not having been given. However, the Registrar-General has given effect to the wrongful sale, and the purchaser is protected

by the provisions of the Real Property Act. Then, as to the question of damages. It is now settled by numerous decisions of the English Courts that the question of damages will not be entertained by Courts of Equity except in cases where the Court has jurisdiction irrespectively of any right to them. And it appears to me that, putting aside the question of damages, the case made by the plaintiff's bill does not entitle him by the rules of equity to any part of the relief prayed. Of course, I express no opinion as to the plaintiff's right to recover at law against the Registrar-General under the 128th section of the Real Property Act, or otherwise. The demurrer must be allowed, but, under the circumstances, without costs.

Demurrer allowed.

HANSON, C.J., GWYNNE, J.] [COMMON LAW.

4 AND 10 AUGUST, 1875.

BOORD v. COMMISSIONER OF WATERWORKS.

LANDS CLAUSES CONSOLIDATION ACT OF 1847.—*Offer—Notice of Trial.*

Under Section 52 of the Lands Clauses Consolidation Act of 1847 *it is sufficient if the offer be made at the same time as the notice of enquiry is given in order to disentitle the claimant to costs in the event of the amount of compensation awarded being less than the amount offered.*

RULE *nisi* calling on the defendant and the Master of the Supreme Court to show cause why the plaintiff's costs should not be taxed.

The plaintiff had obtained a verdict against the defendant for £933 as compensation under the Lands Clauses Consolidation Act.

After the warrant for a jury was issued, but simultaneously with the notice of enquiry, the defendant, while denying the right of the plaintiff to damages, offered £1,000 without prejudice.

The Master refused to tax the plaintiff's costs on the ground that he had received less than the amount of the offer.

J. W. Downer now moved that the rule be made absolute.

Ingleby showed cause.—It is immaterial whether the offer be made before or after the warrant to the Sheriff, but it must be made ten days before the date of trial—

Metropolitan Railway Company v. *Turnham*, 11 W.R., 695, 8 L.T., N.S., C.P., 280

Hayward v. *Metropolitan Railway Company*, 33 L.J., Q.B., 73

Healey v. *The Thames Valley Railway Company*, 34 L.J., Q.B., 52.

J. W. Downer, in support of the rule.—The cases cited prove that the offer must be made anterior to the notice of enquiry. It cannot be made on the same day. That is the case in the present instance. Both the offer and the notice were given on the 23rd April. Besides, the offer is not in the right form, as it denies the right of the plaintiff to damages, and is simply an offer without prejudice.

Cur. ad. vult.

10 August—

HANSON, C.J., now delivered judgment as follows:—

In this case a rule was obtained by *Mr. Downer* for the taxation of the costs of the claimant Mr. Boord, notwithstanding that the verdict of the jury was for a less sum than that previously offered by the Commissioner, on the ground that the offer was not made in time, and in support of this view he relied upon certain expressions of the Judges in the cases of *Western Railway Company* v. *Turnham* and *Hayward* v. *Western Railway Company*, where ERLE, C.J., and BYLES, J., in the former case, and COCKBURN, C.J., in the other, use language which appears to imply that the offer of compensation must be made previously to giving the notice for trial, while in this case the two acts were contemporaneous. But the decision in both of these cases was that a ten days' notice was sufficient; and in the second case, which is the governing case for this purpose, since the others only decided that an offer made some days after the notice of the time and place of trial was too late, BLACKBURN, J., says—"I say, therefore, that any offer made by the Company previous and up to the time of giving the notice of the time and place of enquiry is a previous offer under the 51st section;" and MILLER, J.—"The reasonable time within which the offer must be made is the time of giving the notice of the time and place of enquiry, which brings the parties into direct communication with

each other as to the account." And this is the reasonable construction. The object of giving the notice is to save the claimant the necessity of incurring any costs, and as this necessity does not arise until after the notice of trial is given, an offer contemporaneous with this notice is previous to such necessity. The rule, therefore, must be discharged.

Rule discharged.

HANSON, C.J., GWYNNE, J.] [COMMON LAW.

1, 2, AND 7 JULY AND 18 AUGUST, 1875.

IN THE MATTER OF THE ASSIGNED ESTATE OF PHILIP LEVI AND CO., AND THE BANK OF SOUTH AUSTRALIA.

INSOLVENT ACT, 1860, *DIVISION VI.—Debts—Interest.*

Under Division VI. of the Insolvent Act, 1860, *unless the contrary is declared by the deed, the debtor is not entitled to the surplus until the creditors have received interest on their respective debts.*

Per HANSON, C.J., semble.—*That if the contrary were so declared the creditors would not be entitled to interest.*

Per GWYNNE, J.—*That such a contrary declaration would invalidate the deed.*

A deed, in order to be valid under Division VI. of the Insolvent Act, 1860, *must contain a complete* cessio bonnum, *except as regards articles of household furniture, wearing apparel, and necessaries to the value of £30; and the words in Section* 180 "*unless the contrary be declared by the deed*," *do not warrant any departure from the fundamental principles of the Insolvent Act.*

A deed of assignment for the benefit of creditors, purporting to be made in pursuance of Division VI. of the Insolvent Act, 1860, *conveyed and assigned all the real and personal estate of the debtors to trustees "to the intent that the said real and personal estate shall be held by the said trustees by virtue hereof, subject to the provisions of the Insolvent Act*, 1860, *with respect to arrangements between debtors and their creditors by deed . . . . And to the further intent that they (the said debtors) shall be freed and discharged from all the debts of their creditors . . . . And after full payment of all such costs, charges, and expenses as aforesaid it shall be lawful for them (the said trustees) to apply and apportion the residue of the said moneys in manner directed in Division VI. of the Insolvent Act*, 1860, *relating to arrangements between debtors and their creditors by deed. And after payment of all such debts, costs, charges, and expenses as aforesaid it shall be lawful for them (the said trustees) to pay the surplus (if any) to the said debtors.*"

The deed also released the debtors from their "debts."

Held—*That though the debts from which the debtors were released were the amounts ascertained at the date of the deed, these debts not being extinguished, their incidents—and amongst others, interest—were only suspended; and the very fact that the debtors were released from those debts implied an intention that there should be a corresponding transfer to the creditors of all the appurtenances of such debts.*

That "payment of such debts" means such a payment as would result from the due apportionment and application of the moneys in such a manner as to afford the creditors all the benefits to which they would be entitled under any of the provisions of the Act; and consequently, that there was nothing declared in the deed indicative of any intention to negative the right of creditors to interest.

Per GWYNNE, J.—*That if there had been any such declaration it would have invalidated the deed.*

APPEAL by the Bank of South Australia from a decision of the Commissioner of Insolvency, refusing interest on their debt out of the surplus of the estate remaining after 20s. in the pound had been paid the creditors.

The following was the judgment delivered by the Commissioner of Insolvency, and in which the points involved are fully set out:—

"In this matter two applications were made to this Court—one by *Mr. Belt*, on behalf of the Bank of South Australia, that the trustees be ordered to pay to all the creditors of the debtors interest from the date of the deed on their respective debts; and the other, by *Mr. Way, Q.C.*, that inasmuch as the estate has paid to all the creditors twenty shillings in the pound, the trustees be ordered, after deducting a sum sufficient to pay all claims outstanding against the estate, to pay and assign to the debtors the balance of the estate remaining in their hands and uncollected respectively. Although these applications were made on the same day, and are really dependent on each other, yet as it will be necessary to draw up separate orders as to such applications, I propose to deal with them separately, and will consider first that made by the Bank. It is admitted that the debtors by deed assigned all their estate and effects to trustees for the benefit of their creditors, under the provisions of Division VI. of the Insolvent Act, 1860; and that under such deed the trustees have paid to all the creditors of the debtors dividends from time to time on their respective debts amounting in the whole to 20s. in the pound; that the trustees have now in hand a sum of £28,000 in cash,

debts, and interest; due, but not collected, £4,660; and unsold property, valued at £8,090, against which there are disputed claims by creditors, and costs and liabilities of the trustees, for which they require a sum to be reserved; and that for the purposes of these applications there is at present a sum of £15,000 available for such purposes as the Court may order. *Mr. Belt's* application is made under Section 180 of the Insolvent Act, 1860, which expressly enacts—'All parties to such deed, and all persons bound thereby, shall, in all matters relating to the estate of such debtor, be subject to the jurisdiction of the Court of Insolvency, and shall, *except where the contrary* shall *be declared* or *provided for* by this *Act or the deed*, respectively have the benefit, and be liable to all the provisions of this Act in the same or like manner as if the debtor had been adjudged insolvent, and the creditors had proved, and the trustees had been appointed creditors' assignees under such insolvency.' No doubt under this clause the Court has control over the trustees, and can make such order against them as to the estate as it could against assignees in insolvency, unless the deed contained some provisions to the contrary. In the consideration whether the Insolvent Court has or has not power to order the trustees to pay to the creditors interest on their respective debts, two questions are involved—firstly, whether the deed makes provision on that subject; and, secondly, if it does not, whether Sec. 171 of Division V. of the Act is applicable to deeds of assignment, and by virtue of Section 180 becomes really incorporated with Division VI.? It is quite clear from the cases decided in England as to deeds of assignment that many of the general provisions of the laws relating to persons adjudged insolvent do not apply to deeds of assignment under Division VI.; and a careful perusal of many of the general clauses of the Act shows that they are wholly inapplicable to deeds. For instance, it is quite clear that parts of Division V., which division, by the way, is solely with respect to allowances to insolvents, cannot be made to apply to deeds. Section 168 confers on the Court a power to make an allowance to the insolvent for maintenance until he shall have passed his last examination. Section 169 gives the insolvent who has obtained his certificate an allowance to as high a sum as £600, when, 'by

any order of dividend' his estate has paid 15s. in the £, and the words 'certificate,' 'order of dividend,' and also the provisoes to that clause, one of which disentitles an insolvent to any allowance who has obtained a 'third-class certificate,' show, to my mind, that these clauses cannot be made applicable to Division VI., notwithstanding the words of the 180th section. Thus it has been expressly decided by the Supreme Court in this same estate that the powers of assessment provided for in Division VI. are only applicable in cases of insolvency. In insolvency, unliquidated damages, when assessed in the manner provided for in Section 15 of the Insolvent Act, 1867, are 'provable as if a debt due at the time of the insolvency,' yet it has been held *in re* Thompson, 2 L.R., Ch. App., 795, that such claims are not provable under deeds of assignment, and therefore the debtor remained liable to them after the execution of the deed; so it has been held that a debtor was not released from his debts where there was no release contained in the deed. Again, in insolvency, the Court has power to remove an assignee, and appoint a sitting for the creditors to make a new choice, which may be confirmed or rejected by the Court as it thinks fit. Now, under deeds, the Court has no power whatever either of removal or confirmation; that is left entirely to the creditors under the amended Act of 1870. Then, again, in insolvency the creditors present at any meeting for declaring a dividend may, subject to the approval of the Commissioner, allow to the creditors' assignees a sum by way of remuneration for their services as such assignees not exceeding 2½ per cent. upon the amount applicable for purposes of a dividend at such meeting. Now, if the deed is silent on that point, this power (Section 112) cannot be made to apply to deeds, for the assignment clauses make no provision for dividend meetings; nor is the approval of the Commissioner provided for, so as to create any analogy between deeds and insolvency. And although the words in Section 181 are that the debtors, trustees, and all persons bound thereby are respectively to have the benefit, and be liable to all the provisions of the Act, as if the debtors had been adjudged insolvent, and the trustees had been appointed creditors' assignees, &c., I am of opinion that these words have no other effect than to bring the

deed and the parties to it within the jurisdiction of this Court, and provide a speedy means of deciding all differences and difficulties that may arise in carrying out the provisions of such deed. The trustees are to take the estate (Section 179) 'upon the trusts and for the purposes in and by such deed declared.' This, taken in conjunction with the words in Section 181, 'unless the contrary shall be declared, or provided for by this Act *or the deed*,' &c., leads me to the conclusion that deeds of assignment were intended to contain all the terms upon which the debtors conveyed their estates to trustees for the benefit of their creditors. In fact, the majority of creditors might, by virtue of the words in Section 181, bind the minority to terms of composition or assignment actually opposed to the principles of insolvency. I think the Legislature intended to create by the clauses in Division VI. a system of arrangement outside the Act, and that these clauses contain in all essential particulars provisions sufficient to distribute the debtor's estate in cases where the deed itself is wholly or partially silent on the subject. The deed is to vest the property in the trustees 'under the trusts,' and for the purposes in and by such deed declared, and the creditors are to have the same right of proof as in insolvency, and provision is made as to joint and separate assets which are to be administered as in insolvency (Section 181). Section 187 requires the trustees to make a return to the Court of Insolvency, specifying what estate has been collected, and what is outstanding, and of the amount in the pound proposed to be divided amongst the creditors of the debtor. By Section 188 'when the trustees shall declare any dividend, the sum proposed to be divided shall, except in the case of a final dividend, be *apportioned rateably amongst all* the persons appearing to be creditors of the debtor.' Now, the persons who appear to be creditors are those whose names are inserted in the schedule to the deed, and the amounts in respect of which they are creditors are either (1st) those appearing in the schedule; (2nd) those fixed by declaration of the creditor as provided in Section 186; or, (3rd), in case of dispute, those fixed by order of the Court under Section 181. And amongst such creditors, and according to such amounts, and until full payment of the same, the proceeds of the estate are to be

'*apportioned* rateably.' It is important to notice that in no part of the arrangement clauses is there any express provision as to payment of interest, except in Section 191, which clearly can have nothing to do with the present question. Nor is there any provision as to what shall be done with the surplus estate after the creditors have been paid the amount of their respective debts. Now, Section 171 in Division V.—the whole of which division, as I have before pointed out, has reference to allowances to insolvents—empowers *the Court*, after the estate has paid twenty shillings in the pound and interest, as therein mentioned, to order the surplus to be paid to the insolvent. I am of opinion, for the reasons I have mentioned, that no part of Division V. is incorporated with or applicable to deeds of assignment under Division VI. As Lord CAIRNS points out *in re* Thompson, 2 Chancery Appeals, L.R., on page 806—'If the deed is not a valid deed under that section (the 192nd section of the Bankruptcy Act), there is, of course, an end of the case. On the other hand, if it is a valid deed under the section, then, in my opinion, all that is done by that section and the following sections of the Act is to give the Court jurisdiction over the contract as it affects the deed. The Court has to take the contract which is contained in the four corners of the deed, and to see that the contract is properly administered and carried into execution; but the sections in the Statute do not, as I think, give any power to make any new contract other than that which is contained in the deed between the debtor and his creditors.' Now, the deed in question recites that the debtors, being unable to pay their creditors in full, had agreed to execute the deed for the purpose of distributing their property, and being released from their debts as provided by the Insolvent Act, 1860; then follows a conveyance of all the estate and effects 'to the intent that all the said real and personal estate, property, and effects shall, subject to all liens and encumbrances affecting the same, be held by the said trustees by virtue hereof, subject to the provisions of the Insolvent Act, 1860, with respect to arrangements between debtors and their creditors by deed . . . . and to the further intent that they, the said P. Levi, F. Levi, Edmund Levi, and Alfred Watts shall be freed and discharged from all the *debts* of their creditors . . . .

and after full payment of all such costs, charges, and expenses, as aforesaid, it shall be lawful for them (the trustees) to *apply and apportion* the residue of the said moneys in manner directed in Division VI. of the Insolvent Act, 1860, relating to arrangements by deed by debtors and their creditors, and after payment *of such debts*, costs, charges, and expenses, as aforesaid, it shall be lawful for the said trustees to pay the surplus (if any) unto the said Philip Levi, Edmund Levi, and Alfred Watts, their executors, administrators, or assigns, according to the ownership of the several estates from which the same respectively shall have proceeded.' Now, by the deed the trustees are to pay to the creditors out of the estate the debts due to them respectively—that is, as I have already pointed out, either debts admitted in the schedule or debts proved in manner provided by Section 186 and debts ordered by the Court as provided in Section 181. These *debts* must be due at the time of making the deed of assignment, and the persons to whom they are due are the 'creditors' referred to in the several sections of Division VI., and if any dispute arises as to the right of any person to rank as a creditor in the amount of his debt, the Court of Insolvency is, under Section 181, to settle such dispute. But, apart from the meaning which I have attached to the word '*debts*,' from a consideration of the Act itself, I find that one of the objects of the deed is to release the debtors from their debts—that is, from the amount due by them at the date of the deed. On every principle of construction I must assign the same meaning to the word '*debts*' throughout the whole of the deed. Now, the only claims which rank prior to the debtors' right to the surplus are the costs, charges, and expenses of and incidental to the deed and the trusts thereof, and 'such debts,' that is, such debts as have been before referred to in the deed—the amounts due by the debtors at the date of the making of the deed. The trustees, therefore, are to '*apportion the residue*' in payment of the amounts due at the date of the deed; and this apportionment is to be effected in manner provided by the Act—that is, rateably amongst the creditors. The words 'in manner provided by the Act' appear to me in no way to define what amounts are to be paid, but simply to state the principles on which the sums defined by the deed as

'debts' are to be liquidated. Now, assuming that Section 171 applies to deeds, if we compare that with the trusts of this deed, it will be seen that even then the creditors would not be entitled to interest, for Section 171 does not make the interest after insolvency a debt, but rather a benefit flowing from the debt itself, and really no part of the debt. No doubt it would have been quite competent to the parties in making the deed to have reserved to the debtors all the allowances conferred upon insolvent, or even larger ones had they so agreed, and to have charged the surplus of the estate after paying twenty shillings in the pound with interest after the date of the deed; but they have not done so, and when I compare the duty of the trustees under their deed with the decision of Lord CAIRNS, that the Court has to take the contract contained in the four corners of the deed, and to see that the contract is properly administered and carried into execution, but has no power to make any new contract other than that which is contained in the deed, it seems to me quite clear that the creditors are not entitled to any interest, nor have they any further claim on the whole beyond the amount of their debts as defined in the deed. The trustees are to apply and apportion the residue of the whole after paying certain costs, &c., in manner directed in Division VI. of the Insolvent Act, 1869, and this is as provided in Sections 187, 188, and 189, by dividends to be apportioned *rateably*—that is, according to the amount of each creditor's debt, and after all such debts are paid the trustees are to pay over the surplus to the debtors according to the ownership of the several estates from which the same respectively shall have proceeded. The arguments used by *Mr. Belt* were that Section 171 was applicable to deeds, and that the creditors had a right to apply the dividends received from time to time in payment of the interest due, and carry the balance to the payment of the debt; but this latter argument does not seem to me to touch the real question at issue in this case, nor as a matter of fact was it shown that the Bank had so received and credited these dividends. There are other reasons than those I have mentioned which, in my opinion, are equally fatal to *Mr. Belt's* application. For instance, to make the order asked for it must be shown that the trustees have funds in hand sufficient to pay the

interest before I could make an order; but it is quite clear that the estate now in hand is wholly insufficient to pay even the interest which the Bank claims. Still I have preferred, considering the question in the broader aspect, to limiting my decision to a minor or technical point. I have now treated all the arguments advanced on either side except that of *Mr. Bruce*, who appeared for Mr. Watts. He urged that, as the Bank had from time to time held very large sums of money in the estate of the trustees at a small rate of interest (I think from 3 to 4 per cent), it would be inequitable, if their (the Bank's) contention is correct, to now allow them interest at the rate of 8 per cent. It is hardly necessary to consider this point, as I have disposed of the application on other grounds; but clearly the argument is not well founded, inasmuch as the right to interest is fixed by the Act at 8 per cent., and the rate the Bank paid to the trustees on deposit was fixed by contract, and could not be set up as an answer to the statutory rate. I have not dealt with the question whether the creditors would or would not be entitled to interest outside the Act and the deed. In the first place, because I am of opinion that the deed itself disentitles them to any claim they might otherwise have to interest in a Court of Equity; and in the next place, because Section 171 being, as I have stated, in my opinion inapplicable to deeds, this Court, independently of the deed, has no jurisdiction to award interest, or to deal in any way with the surplus estate. The petition and application by the Bank will therefore be dismissed. The trustees' costs to be paid out of the estate. I say nothing about the debtors' costs, as they are entitled to the surplus estate; but I do not order costs against the Bank, as it is a case of first impression, although not one in which I have any doubt. The Bank will, of course, pay its own costs. With reference to the application by the debtors for the surplus estate, I am of opinion that the debtors are entitled to the surplus estate, and as the trustees admit that a sum of £15,000 is now in hand, over and above what can jointly be required to pay costs, unpaid dividends, or claims of creditors which are still in dispute; and as the trustees simply submit to any order the Court may think proper to make, an *interim* order will be made that the trustees pay over to the debtors the said sum

of £15,000, according to the ownership of the several estates from which the same has proceeded; either the debtors or trustees to be at liberty to apply to the Court, if necessary, for further directions as to the division of the £15,000 amongst the debtors."

Ingleby, *Mann*, and *Belt*, for the appellants.—The matter on which His Honor the Commissioner of Insolvency gave the decision from which we now appeal arises out of two deeds executed by the Messrs. Levi & Watts, whereby they, being unable to pay their liabilities in full, proposed to assign their estate for the benefit of their creditors, and that the same should be realized according to the provisions of the Insolvent Act, 1860. The question to be decided is, whether the creditors are entitled to have interest on their debts from the time of the assignment until the date of payment. The question the learned Commissioner divided into two branches; (1) whether the deed made any provision on the subject; and (2) whether Section 171 in Division V. of the Act is applicable to the question, and by virtue of Section 180 can be incorporated in Division VI. of the Act, under which division the deed said the estate was to be distributed. We shall, however, submit that whether this deed can come under the Act or not, under both state of facts are the creditors entitled to interest. There is one point to which we would refer, though it is not necessary for the purpose of determining this question, and that is the misapprehension under which the learned Commissioner seems to have framed his whole judgment. The learned Commissioner stated it to be his opinion a majority of the creditors, by virtue of Section 181, could bind the minority to terms of composition or assignment clearly opposed to the principles of the Insolvency Act, and, further on, he asserted that it was competent by such means to invest the debtor with larger powers than those possessed by creditors. That seems to have been the text upon which the Commissioner made up his mind, but we venture to think that if the arguments upon which it is based are fairly weighed, it will be found that they do not bear out the view taken by the learned Commissioner. He also seems to have gone upon the assumption that because certain points in the Bankruptcy Act of 1861 had been decided in a certain way at

home, that our Act must be construed in the same manner, and it will therefore be necessary for us to point out the little analogy that exists between the Bankruptcy Act of 1861 and our Insolvent Act of 1860. We would point out that Act is a Consolidation Act, and therefore all previous insolvency law was repealed and re-enacted. It is a well-known rule of law that in constructing such Acts it is always assumed the Legislature did not intend to alter anything that it did not expressly amend, and that where the Consolidation Act varies the previous Acts, you must find out from the Act in what it varies it; but it is always understood that no greater alteration is made than what has been most clearly expressed. (HANSON, C.J.—The Act of 1860 was simply to amend the Consolidation Act.) Yes; the Consolidation Act bears the date of 1849. (GWYNNE, J.—I don't see how this applies to the case.) The learned Commissioner, to do him justice, appears, in his judgment, to have gone upon *in re* Thomas, L.R., 2 Eq. App., and to have quoted the doctrine of Lord CAIRNS that the deed itself is the contract between the parties, and all the Court had to do was to see the contract was carried out. That is, undoubtedly, good law. I may be insolvent, and make a specific agreement with my creditors to pay 13s. 4d. in the pound. They are bound by that agreement as I am.) Yes, if all agree. (GWYNNE, J.—If three-fourths agree.) There must be a *cessio bonorum*, and the property must be divided rateably between the parties. (GWYNNE, J.—Then you say there is a moral deed, and the essentials of which they must fulfil? If there be, I cannot find it in the law. Furthermore, you say this deed would not be binding?) Not on the minority. It is not a deed under the Act. The deed can only affect the internal arrangements of estates, but cannot form the trust itself. We would point out that there is not much difference between the Acts of 1860 and 1857-8, save that, if anything, the latter is stronger against the debtor. The Act of 1857-8 is almost an exact copy of the Bankruptcy Law Consolidation Act of 1849, with the exception of necessary substitution of the word "insolvency" for "bankruptcy." That Consolidation Act was, as we have already said, amended by the Act of 1860. The 165th clause of the Act of 1857-8 is repeated in the Act of 1860, and by it there must be on

the part of the debtor an absolute *cessio bonorum*, whether the estate be administered under deed of license, inspectorship, or division of the proceeds by the trustees—

Drew v. *Collins*, 6 Ex., 670
Tetley v. *Taylor*, 1 El. & Bl., 521.

These cases, the effect of which is stated at p. 627 of Robson's Bankruptcy, has governed all subsequent cases. (GWYNNE, J.—You do not dispute that there was a *cessio bonorum* in this case?) On the contrary, we admit it was most absolute. (HANSON, C.J.—What I believe you contend is that there must be something more than a *cessio bonorum*, and that the property so included in the *cessio bonorum* must be distributed and applied as if it had been from the first under insolvency?) Yea, that is our contention. We would call attention to the 185th section of Act 1860, the 167th section of the Act of 1857-8, and the 228th section of the Bankruptcy Law Consolidation Act of 1849, all of which will be found to be identical. In both the cases to which we have already referred (*Drew* v. *Collins* and *Tetley* v. *Taylor*), it will be found that it was decided that, though the matter was under deed, the estate must be distributed as if it had been under insolvency—

Vide judgments in *Drew* v. *Collins*, of Chief Baron POLLOCK, Barons ALDERSON and PRATT.

(GWYNNE, J.—This is a sort of *a priori* argument on the agreement without looking at the words of the deed.) Perhaps so; but as a large portion of the Commissioner's judgment is founded upon it, we have felt it our duty to address ourselves to it. We would call attention to the judgment in *Tetley* v. *Taylor*. (GWYNNE, J.—Suppose one creditor had a debt bearing interest by force of law, and suppose he is the only creditor in that position, would it not be a monstrous injustice that three-fourths of other creditors, whose debts bore no interest, by force of law could compel him to come under a deed by which he would get no interest at all? It is hardly possible to suppose the Legislature would do such a mon-

strous thing, although they do monstrous things sometimes. But what does the deed provide? (1) That they shall pay all costs and charges; and (2) that out of the residue they shall pay all debts in accordance with Division VI.) And there is no clause in the division that can bring it under the Act? (GWYNNE, J.—Unless clause 171 in Division V. is to be read in conjunction with the clauses of Division VI.) And then we should be entitled to interest by reason of the very word "debts," on which the Commissioner founded his judgment for excluding interest. All deeds for the distribution of debtors' property are an act of *quasi* insolvency. The bankruptcy law from 13 Elizabeth down to 6 George IV., 1825, makes no provision for payment of debts. Before the first Consolidation Act, 6 George IV., passed in 1825, there was no provision for the payment of interest, the Lord Chancellor having, in the exercise of his prerogative, and seeing that justice was done, usually granted interest, though it is true that on one occasion Lord ELDON said he did not know how the practice had crept in—

Bromley v. *Goodier*, 1 Atkins, 75.

(GWYNNE, J.—The argument on the word "debt" is about as equally good as that on the word "surplus." Surplus means that which shall be left after twenty shillings in the pound, with interest, has been paid. The meaning of the word debt *per se* is principal and interest; surplus, the remainder after both has been satisfied.) Then we would call attention to

Ex parte *Champion*, In re *Mills and Swanston*, 3 Bro. R. by Eden, 435
Ex parte *Hankey*, ibid, 503
Ex parte *Reeve*, 9 Ves., jun., 588
Gray v. *Megrath*, 30 L.T., N.S., 16 (the judgment of Lord COLERIDGE)
Bateman v. *Margerison*, 16 Bevan, 477
Pearce v. *Slocombe*, 3 Y. & C., 584.

The learned Commissioner has taken too narrow a view of the

meaning of the word "debt" when he affirms that it only means "principal," and excludes "interest." There is one word in the Commissioner's judgment which shows that he has not apprehended the deed. The deed says that the assets shall be distributed according to Division VI., but His Honor, by his judgment, has construed the word "distributed" into "administered," which is not nearly so strong a word. There is one other case to which we would call attention,

Ex parte *Spyer* in re *Josephs*, 1 DeGex, J. & S., 318,

and there it was decided that creditors under £10 cannot be paid in full, but must rank as other creditors. (GWYNNE, J.—The question of what is a debt is inapplicable until it is decided what the debtors are to do under Division VI. to distribute the estate.) We will call your Honor's attention to a Victorian case—

Heath v. *Hawthorne*, 2 Webb, Wyatt, and A'Beckett.

There is also

Ex parte *Gibbins*, 12 L.T., N.S., 787.

The deed points out what the debts were at the time it was made, and the distribution was to be as soon as possible; whereas, in point of fact, the distribution did not take place for some seven or eight years afterwards. There are several clauses in Part V. of the Act which have to be read with Part VI., and why should an exception be made to this clause—171? Supposing there had been a co-debtor, his interest would have stopped with the insolvency and from the time of executing the deed, and the co-debtor would be liable for all subsequent interest.

The *Attorney-General (Way, Q.C.)*—The first point I shall take is that clauses 168 to 171 in Division V. are not incorporated in Division VI. at all, and that even if they be, they do not govern the case the Court has to decide, as they are for the benefit of the insol-

vent. Clause 168 cannot apply, as it refers simply to allowances to be granted the insolvent up to the date of his passing the last examination. Clause 169 cannot apply, as it also relates to allowances, and the remarks of the Lord Chancellor in

Ex parte *Gibbins*, 12 L.T., N.S., 787, and 34 L.J., Bankruptcy, 39,

are as applicable to all the other clauses as they are to clause 169; and clause 170 is inapplicable, as it sets forth the things the insolvent may retain so long as the whole do not exceed £30 in value; and, as regards clause 171, its language shows it is inapplicable to Division VI. As regards the word "surplus," I would submit that it does not bear the arbitrary meaning put upon it by His Honor Mr. Justice GWYNNE, but should simply have its usual meaning. Division VI. makes the date of deed either that of the fiat, or the date of the petition for adjudication. Though there may be these two dates, it is generally the date of adjudication that is adopted, and for this reason—when a creditor hears that his debtor has committed an act of bankruptcy, he files his petition, the defence is taken, the matter is contested, and the matter may be adjourned from time to time, so that considerable time may elapse between the date of the petition and that of adjudication. In England, before the recent amendment of the Bankruptcy Law, the adjudication had reference not merely to the data of the fiat, but to the first act of insolvency committed by the debtor. I think the Court has no reason to strain the language of Division VI. so as to make it say that the creditors are entitled to interest; and I further think that the matter does not depend upon that. I am bound to admit —as has been pointed out by my learned friends—that from the earliest times in bankruptcy, when a surplus has been handed over to the debtor, interest in some form or another has been secured to the creditors; but I would point out that not only is Section 171 inapplicable to Division VI. of the Act, but that moreover the distribution is to be made in a manner totally foreign to the section. The deed says that the estate shall be divided rateably among the creditors according to the amount of their debts, and that must

mean the amount that the debts were at the execution of the deed. In the Statute of Henry VIII., and Elizabeth, and, I believe, until the Statute of Anne, there were no provisions for discharging the debtor at all; and though he might satisfy his creditors, and pay them twenty shillings in the pound, still, when he went before the Court, and applied for the surplus, it would not be granted to him, as the Court considered that the creditors had still a claim upon him for interest, which they could obtain by coming to the Court in a circuitous manner. After a careful search of the Acts I have only been able to discover that the word "debt" means twenty shillings in the pound of the amount due at the time of adjudication; and that, I venture to think, is established by Section 171. The next question I wish to bring before the Court is that Division VI. makes it imperative that the deed should give interest beyond twenty shillings in the pound. As the deed does not do so, if it is to be brought under the operation of Division VI., it is a bad deed and invalid; no order could have been made upon it, and from the order there could be no appeal. And I think the Court will also see that there is no necessity for such a provision in the deed. This deed is under a legislative enactment, which, while it secures the satisfaction of the creditor, gives the debtor no discharge, and it would be altogether opposed to the principle of the insolvency law to make it compulsory that the debtor should satisfy the creditor, pay interest, and then not obtain a discharge. A very slight reference to bankruptcy legislation is necessary to dispose of the remark which has been flung out by His Honor Mr. Justice GWYNNE—more, I think, for the purpose of eliciting argument than anything else—that it would be a monstrous thing that one creditor should be shut out from obtaining interest on his debt. It is only necessary to keep one's self within the covers of this very Act to find that such a state of things can arise under Division VI., part 2. The argument on the other side is that the whole principle of insolvency legislation is that the estate shall be divided equally among the creditors, having due regard to their incidents and interest; but that is inaccurate, and is opposed to the case in 6 Common Pleas, where it is decided that, for the purpose of satisfying creditors, twenty shillings in the pound without interest is

sufficient, and that interest is not a necessary incident. What I would most strongly point out to your Honors is that this arrangement does not free the debtor, and that there is a continuing liability on his part, as the deed grants no discharge, and, further, that the whole machinery of the Act simply implies the payment of debts, and never anticipated a surplus at all. I fancy my learned friends will not contend that satisfaction can go beyond twenty shillings and interest. Supposing a man made a deed by which forty shillings or eighty shillings would be secured to the creditors, could they claim the surplus? It does not mean that because some of the creditors fail to come in under the deed that their dividends are to go to the other creditors, but that the moneys that would have been absorbed in paying their dividends will go in liquidation of the dividends of others, and that whatever remains shall be the property of the debtor. And I submit it is clear that the amounts constituting the debts must be the amounts at the time the deed is executed, and not what they may be at any future time. If that were so, the validity of the deed would be a constantly changing event. It would be in this way. There would be some debts carrying interest by force of law, and others, simple contract debts, that would receive the interest the law allowed. Now, such being the case, what would to-day make three-fourths of a given whole would be less than three-fourths to-morrow or the next day. It must, therefore, be perfectly clear that what is meant by composition of the debt is paying twenty shillings in the pound on the debt and the interest it may be bearing at the time the deed is made—

Ex parte *Wilmott*, 2 L.R., Ch. 795; 36 L.J., Bank, 17.

2 July—

The *Attorney-General (Way, Q.C.)* in continuation.—The cases cited by the other side can be divided into three classes—(1) That under deeds for the payment of debts creditors are entitled to interest. (2) That in bankruptcy creditors are entitled to interest. (3) The strict construction put upon the clauses providing arrangements between debtors and creditors

under the Statute. As regards the first class of cases, there is really very little difference between ourselves and our learned friends; and the difference is this, that whereas my learned friends say the creditor must get interest on his debt under any circumstances, I say that he can only get it if it is provided for in the trust-deed—

Fisher on Mortgages (2nd Ed.), 900, 901
Lewin on Trusts, 4th edit., 363, 364
Pearce v. *Slocombe* (ante),

there referred to.

Bateman v. *Margerison* (ante),

cited by the other side, is no authority in this case, as the deed there contemplates the payment of debts that may be due, which are not yet due, or may hereafter occur. It contemplated that amount for which the dividend is to be paid is not the amount at the time of making the deed, but the amount and interest up to the time the dividend is paid the deed contemplates no such thing. It is true that a speciality debt may bear interest—

Thompson v. *Drew*, 20 Beav., 52.

(GWYNNE, J.—If I am owing a retail tradesman £50, from the moment he gives me notice in writing that, from a certain period he charges interest, from that moment the debt becomes one carrying interest. Would it not be so in this case?) At first, the usury laws were totally opposed to interest. At one time, if I may so speak, the Common Law very closely followed the scriptural injunction. On this point of the case there is really no dispute between the parties, as our argument commences at the point from that at which the other side ceases.

Drew v. *Collins* (ante)
Tetley v. *Taylor* (ante),

cited with such confidence by my learned friends, have no application to this case, as they arose out of a totally different state of the law. They have also been dissented from, and Lord CAMPBELL, who gave judgment in the cases, has been overruled—

Ex parte *Morgan*—In re *Woodhouse*, 11 W.R., 316.

It having been found by those decisions that the law was capable of an interpretation contrary to its spirit, both the Imperial and local Legislatures took means to evade such a state of things, and clause 181 was the result of the attempt. That clause, as I take it, simply creates the machinery which shall regulate the rights of creditors brought into existence by the previous clauses. It in no way prescribes the mode of distributing the estate further than it says it shall be done as if it was under insolvency, and that has been ruled to mean the payment of twenty shillings in the pound without interest—

Lord WESTBURY'S judgment *ex parte* Gibbins.

That, I submit, brings us round to the question whether the deed is valid. I think it is obvious, both from Bankruptcy and Company Law, that the majority shall have power to bind the minority, and that in this case the limits of their power shall be the limitation imposed by Division VI. of the Statute. The question of the validity of the deed depends not upon whether the Act authorizes its provisions, but whether they are forbidden. If they were not forbidden, then they are good—

Bruce on the Doctrine of *ultra vires*, 38, 40.

(HANSON, C.J.—If this deed professes to bind the dissenting creditors, it must be shown that such a power is conferred to it.) It has such a power. The whole estate is vested in trustees, and they have therefore the power to deal with the whole of the creditors, whether they assent or dissent to the instrument, and they are bound by the deed until the same shall be set aside, and

the debtor shall have power to deal with the surplus. (GWYNNE, J. —If a man binds himself to take twenty shillings in the pound without interest, is not that a composition? It is less than the law would give him, as the law allows interest. Beyond being a composition, it has this vice—it forces persons to accept it *nolens volens*. (HANSON, C.J.—That vice is inherent to the insolvency law.) There is nothing in the law to prevent such a principle, and therefore it is for the other side to show that it is forbidden. The whole subject is exhausted in Division VI. of the Act, and the limitation there is that you pay twenty shillings in the pound without interest, and that the majority can bind the minority, and that the dissentient creditors are bound by the acts of the assenting creditors. (HANSON, C.J.—If this deed had been for a composition of fifteen shillings in the pound—which appears to be conceded would be an invalid deed—would the Commissioner have the power to set it aside, or must he refuse to act upon it?) He must refuse to deal with it. In the cases cited by the other side, of which the side-note made it appear that creditors could get interest, interest was simply given because it was part of the contract. Then it has always been supposed that a mortgage obtained interest; but the case of

Thompson v. *Drew* (ante),

shows that he can be debarred from that when it appears that the contract has no clause giving interest. Lastly, as regards the Victorian case cited by *Mr Mann*—

Heath v. *Hawthorne*, 2 Webb, Wyatt, and A'Beckett, 87,

that is inapplicable, owing to the Victorian and the South Australian bankruptcy laws not being the same.

J. W. Downer, on the same side.—Section 181 merely affects the rights of creditors, *inter se*, and has nothing to do with debtors—

Vide opinions of Lords CAMPBELL and WESTBURY *(ante)*.

Sections 188 and 189 show how appropriation of an estate is to be managed. Division VI. exhausts the matter in the payment of twenty shillings in the pound, without interest. Section 190 even contemplates the impossibility of twenty shillings in the pound being paid—

Shelford on Bankruptcy, 623.

Cur. ad. vult.

7 July—

J. W. Downer, in continuation.—Two classes of cases have been cited by the other side, the first showing that creditors are entitled to interest upon estates under the Act, and the other that they are also entitled to interest under trust-deeds altogether apart from the Insolvency Act. As has been pointed out by the Chief Justice during the course of the argument, the Act contains certain provisions altogether inconsistent with the general policy of insolvency, inasmuch as it assumes that all creditors shall be paid twenty shillings in the pound on the amount of their claims at the time of the insolvency, without regard to any question of interest, and also that the rules applicable to trust-deeds are not applicable to cases of insolvency. The decisions given under the Act of Elizabeth and subsequent Statutes give the creditors interest; but then those were decisions upon particular provisions of the Statutes—

Vide judgment of Lord Chancellor HARDWICKE,
Bromley v. *Goodier* (ante),

That decision was founded upon the improbability of the Legislature having intended the bankrupt to have the surplus, after payment of his debts, handed over to him, and he be left liable to have the interest of those debts recovered from him by separate actions. The case also refers to the Statute of Anne. The cases *in re* Champion, *in re* Hankey, and *in re* Reed merely follow the case of *Bromley* v. *Goodier;* and there had been, when they were

decided, no alteration in the law. All the other cases cited were under deeds

Bateman v. *Margerison* (ante),

was under a deed, not under the Act, to pay twenty shillings in the pound, and the trustees allowed a speciality creditor interest on his claim. The other creditors objected on the ground that they were *pro rata* entitled to interest. Held—That interest stopped with the date of the deed and did not continue, but that claims bearing interest before that date would continue to receive the same. The case, instead of being an authority for the other side, was simply one as against the general policy and scope of the insolvency law, as by that decision, before twenty shillings in the pound was paid, the creditor would receive his interest out of the *corpus*. If that were so, the decision would simply be a declaration that the general policy and scope of this law is unfair and unjust. (HANSON, C.J.—Hardly that, but that it did not apply to a composition deed under the authority of the bankruptcy law.) The Victorian case, *Heath* v. *Hawthorne*, was decided under a law which expressly gave interest, and, considering that was the case, it was surprising that the case was argued, and not surprising that the argument was not pressed with any force—

Ex parte Spyer *(ante)*,

brought before the Court owing to an arrangement under the deed by which creditors under £10 were to have their claims settled in full. The decision in that case was that the power was one that the trustees could exercise or not as they pleased; that it was inconsistent with the scope of the whole provisions of the deed, and, therefore, might be rejected; and that, being a power repugnant to their duty, one which they had no right to exercise. In strictly construing the provisions of an Act, one of the means that a Court adopts to obtain that object is to endeavour to find out the mischief they endeavoured to remedy—

Vide the remarks of Lord WESTBURY *in re* Mew and Thorn, 31 L.T., Bankruptcy, 587.

By parity of reason, from the remarks just quoted it must be obvious that the Act of 1860 must have proceeded from some motive. If satisfied with the existing state of things, it would have been unnecessary for the Legislature to make any fresh provisions on the subject; yet the result of the argument of *Mr. Ingleby* is that the effect of the Act of 1861 is in no way to vary the Act of 1857-8, because he says under both there must be a *cessio bonorum* and a complete distribution of the estate of the debtor among his creditors; and that under both the principles of bankruptcy apply to the distribution, despite the fact that there are broader words in the Act itself; and that the Act creates an entirely new code as regards arrangement deeds. The cases cited by the other side—

Drew v. *Collins*, 6 Ex., 670,
Tetley v. *Taylor*, 1 El. and Bl., 621,

show how strict a construction the Exchequer Chamber put upon the provisions of the Act of 1849; and those decisions, no doubt, caused the Acts of 1860 and 1861, and the insertion of the provisions of Division VI. in the latter Act. It would seem from Division VI. that the assignment of the whole of the debtor's estate is still necessary, though it was probably the intention of the Legislature not to make a complete assignment of everything. If the argument of *Mr. Ingleby* is accepted, then the words in Section 179 "upon the trusts and for the purposes as in the deed declared," and the words in Section 180 "subject to the jurisdiction of the Court of Insolvency, except where the contrary shall be declared by the Act or the deed," will be absolutely meaningless, neither can their limited sense be accepted. Now, as regards "surplus," there is no provision for that in Division VI. at all, and the clauses in that division are absolutely inconsistent with their being anything over twenty shillings in the pound realized on any estate. That is the effect of Sections 187 to 189, and they clearly refer to something less than twenty shillings in the pound. If there was, this anomaly would arise that the trustees would have to divide the residue of the money among the creditors who had assented in a manner altogether out of proportion to their debts,

and the interest upon them. It is quite plain that these sections had in view something under twenty shillings in the pound, and never intended such an absurdity as to give the creditors a bonus utterly without regard to the amount of their debts. Then the Act requiring a complete assignment by the debtor, and requiring creditors to be paid up to twenty shillings in the pound, but there being no provision directing what shall be done with a surplus unless Section 171 can be incorporated with Division VI. of the Act, the question arises, is it so incorporated? The only way in which it could be would be in conjunction with Section 181; and when the latter clause is examined it will be found that it has no reference to debtors whatever, but simply to creditors, and that it defines the relative rights of creditors. Throughout the Act, the word "debts" has one inflexible meaning—the amount due at the date of the petition. Except the one clause admitting the proof of interest up to the date of the petition, there is no provision whatever for interest. Indeed, the whole division is framed not for the benefit of the creditor, but of the insolvent, proving a ready means whereby he can get his surplus, and saving him from having to file a bill in equity. And no reading can make "debt" include "principal and interest," for this reason, that, in the Act, "interest" is the opposite to "debt," and it will not be considered an ultra-refined argument to say that because the word "debt" bears one meaning in one part of the Act, it must bear the same throughout all its provisions. The decision of this Court in the Talisker Mining Case proceeded upon the meaning of a word broad enough to include particular property stated to be excluded—

Vide remarks of Mr. Justice GWYNNE, while in Equity, 6 S.A.L.R., 98.

(GWYNNE, J.—Even if you eliminate Section 171, debt, in its limited sense, would include interest, because then it would be the principal with its accumulated interest up to the date of petition.) But even then, the interest is not a debt. If Section 171 were not in the Act, we understand your Honor to consider that "debt" would have the meaning for which we contend? (GWYNNE, J.—It seems so to me.) It is plain that Division VI. contains no pro-

vision in regard to a surplus, and the question therefore narrows itself down to this—Can Section 171 be incorporated in this deed? This deed must be either good or bad. If the deed be good, then the creditors are not entitled to interest. If the deed be bad, then the creditors are not entitled to interest. If the deed be bad, then the Court has no jurisdiction, and the matter therefore comes back to the question—What is the meaning of the deed? Even if it be bad the creditors would be bound by it, as they have assented to it—taken dividends under it; and that would be an estoppel. Clause 171 cannot be included in this deed. In the first place it cannot be included, for there is the subsequent provision as to the surplus. The parties to the deed did not intend to introduce it, because if so they would have either expressed their intention or remained silent altogether on the subject. If they had so intended they would not have put provisions in the deed providing for something completely inconsistent with clause 171. That there could be two constructions of the deed would be an absurdity which we venture to think the Court would be reluctant to adopt. The Court has nothing to do with the effect of ordinary trust deeds, as under our Act the deed, and the deed alone, must be taken as the contract binding upon the parties, and to be administered by the Court. (GWYNNE, J.—Suppose a person having a debt of £5,000 refused to come in and sign, or to commit himself by a writing to sign, what is to be done with the £5,000? Suppose, as in this case, there had been sufficient to pay twenty shillings in the pound and pay a surplus, would this £5,000 form part of the surplus? How would you act? Would you argue that this £5,000 should be paid over to the assignees?) It is not necessary for us to argue that point; but it would be necessary for the other side to argue that it should be divided among the other creditors.

Inglehy, in reply.—If I understand the argument of the other side it ranks under two heads—first, that they have to satisfy the Court that in Division VI., Section 171 is not necessarily included; and second, having satisfied the Court that such is the case, that they have next to contend that by the deed they have made a different distribution than that indicated in Section 171. *Mr. Downer* has

said, the means by which a Court finds out why an Act is altered is by endeavouring to discover the reason that prompted the Legislature to make the change, and he has ventured to assert that the intention was to change the principle of the Act. On that I join issue. The Act previously in force had been found to make the working of an estate under the control of the Court a very costly matter. And further, it strung the matter up for three months before the trustees knew what could be done with the estate, and at the end of the period the whole of the proceedings might be upset. It was found in a country like South Australia, possessing so large a tract of territory, that it was very difficult to bring insolvents up to town to get released from their debt, and it was felt that some more facile remedy must be afforded them than what they obtained under the Act of 1857-8. The attempt to draw an analogy between our Act of 1860 and the English Act of 1861 most evidently failed on the grounds of chronology, also on the score of similarity. That the Act of 1860 was but meant to simplify the machinery of the Insolvent Court, and to give persons living in the outskirts of the colony more facile means of being relieved from debt, will, I think, be clear to all who examine the clauses under which a deed of assignment can be made. The Act never proposed to alter the principle of the law.

HANSON, C.J.—No doubt the scheme of distribution under Division VI. involves the importation of clause 171, then I think we shouldn't hold that the deed was bad. It appears to me that the two questions are—1, whether they have any liberty to provide for the apportionment of the estate in any other manner than if under insolvency; and 2, if they have, whether they have done it by the deed.

GWYNNE, J.—What has struck me—and it is forcibly supported by *Drew* v. *Collins* and *Tetley* v. *Taylor*—is this:—If I hold an overdue bill of exchange, that is an instrument carrying interest. That is my *status* and my right before I enter into this arrangement. By signing this deed I bind myself to receive less than my

legal rights, and how can this be distinguished from a composition deed?

HANSON, C.J.—Though I may come to that view of the matter, I have not yet arrived at it.

Cur. ad. vult.

18 August—

Judgment herein was now delivered as follows:—

HANSON, C. J.—This case comes before us by way of appeal from an order of His Honor the Commissioner of Insolvency, dismissing the petition of the Bank of South Australia for payment of interest *pro rata* upon the debt due to them, so far as the assets in the hands of the trustees might extend; and two questions are involved in its decision —1st, Whether the Insolvent Act of 1860 authorizes the execution of a deed of assignment which provides for the disposal of any part of the estate of a debtor in any other manner than that prescribed with regard to the estate of an insolvent; and, 2nd, Whether the construction put upon this deed by the learned Commissioner can be supported. The Insolvent Act of 1857-8, so far as related to arrangements by deed, was modelled upon the English Bankruptcy Act of 12 and 13 Victoria; but the Act of 1860 contains some entirely new provisions. Section 165 of the Act of 1857-8, which answers to Section 224 of the English Act, has been replaced by Section 172 of the Act of 1860, and a new section—180—has been introduced. The cases, therefore, of *Collins* v. *Drew*, and of *Tetley* v. *Taylor*, which were relied upon by the appellants, have only an indirect bearing upon the present question which must be decided entirely by a consideration of the effect of the provisions of the Act itself. The nature of the deed which the Act of 1860 sanctions is explained in the 172nd section. It is to be the act of the debtor, to contain certain particulars, to be executed and attested in the prescribed manner, and it is to convey to trustees the estate and effects of the debtor for the benefit of his creditors; and then, if executed by a certain proportion of the

creditors, within a specified period, it is to be valid and binding upon non-assenting creditors. The permission given in Section 174 to except certain articles of the value of £30 from the schedule shows that, with this exception, the whole of the estate and effects must be included, so that there must be a complete *cessio bonorum*, and a deed which professed to except from its operation any part of the assignor's estate beyond the £30 would have no validity under the Act. And as the assignment is for the benefit of the creditors, this would *prima facie* imply that all the estate assigned for that purpose was to be so applied. Taken by itself, therefore, Section 172 would have practically the same effect that was given to Section 224 of the English Bankruptcy Act in the cases to which I have referred; and taken in connection with Section 181, which is substantially identical with Section 228 of the same English Act, it would require that the whole estate should be distributed among the creditors, in manner prescribed in relation to debtors who have been adjudicated insolvent, until their debts were fully satisfied. It was argued, however, that the language of Section 180 showed that this could not be the intention of the Legislature; that the words "except when the contrary shall be declared or provided for by this Act or by the deed," show that it was intended to allow a greater latitude of arrangement, and to give to three-fourths of the creditors the power of assenting to a deed which should bind the non-assenting minority, although it provided for the application of the estate in a manner different, in some particulars, from that prescribed in relation to the estates of insolvents. And I am, though somewhat doubtfully, inclined to adopt that opinion. I think we are bound to give some effect to the words in question, and I cannot put any other meaning upon them but this. But, though I think that these words authorize a certain departure from the provisions of the Act, it would always be a question whether any particular arrangement was within the scope of such authority; and, in deciding that question, nothing, as it appears to me, could be sanctioned which affected the fundamental character of the deed—that it was to be a *cessio bonorum* for the benefit of creditors. We are thus brought to a consideration of the second question—what is the proper construction of the deed? Does it warrant the

conclusion which His Honor the Commissioner has drawn from its language? The language of the deed, so far as material, after conveying the estate and effects of the debtors to trustees, is—I cite from the judgment of His Honor—"to the intent that the said real and personal estate shall * * * be held by the said trustees by virtue hereof, subject to the provisions of the Insolvent Act, 1860, with respect to arrangements between debtors and their creditors by deed * * * and to the further intent that they, the said (debtors) shall be freed and discharged from all the debts of their creditors * * * and after full payment of all such costs, charges, and expenses as aforesaid, it shall be lawful for them (the trustees) to apply and apportion the residue of the said moneys in manner directed in Division VI. of the Insolvent Act relating to arrangements by deed between debtors and their creditors. And, after payment of such debts, costs, charges, and expenses as aforesaid, it shall be lawful for the trustees to pay the surplus (if any) to the debtors." The words of the deed upon which the argument turned were "after payment of such debts;" and it was argued that both by the deed and the Insolvent Act the word "debts" was used so as to exclude interest. Reference was made to Section 171, where the distinction between debts and interest is pointedly drawn; and it was urged that the requirement that there shall be a schedule containing the names of the creditors, and the amounts (*i.e.*, the debts) due to each of them, shows that these debts were considered as fixed at the time of the execution of the deed, and incapable of any addition by reason of the accruing of interest, and that the deed does contain such a schedule, defining the amounts due to the separate creditors, which amounts are the debts referred to in the passage cited. And His Honor the Commissioner draws a further argument from the circumstance that the deed contains a provision that the debtors should be released from their debts—that is, from the amounts which they owed at the time of the execution of the deed, either as defined by the schedule, or proved in the manner provided for by the Act. I quite agree that the effect of the execution of a deed under the arrangement clauses is to fix the amount of the debt with reference to the then existing state of account between

the debtor and creditor, and, as between creditors, to place those whose debts do and those whose debts do not bear interest upon a footing of equality in respect of dividends until the whole amount due at the time of such execution has been satisfied. And, further, the deed does provide for a release of the debtors from all the debts owing by them. Nevertheless, there is nothing in these circumstances which, in my view, could authorize us to narrow the meaning of the word "debts" in the passage in question so as to exclude their legal incidents—those incidents which, if I may use the expression—are appurtenant to them, whether by virtue of their quality, or by virtue of the contract under which they arose. And I confess myself unable to agree with the reasoning of the learned Commissioner as to the effect of the provision for a release of the debtors. I should, indeed, be disposed to draw the very opposite conclusion from that circumstance. The debtors assign their property in consideration of the release, and the creditors grant the release in consideration of the assignment. The two are correlative, and, therefore, the benefit of the assignment to the creditors should be co-extensive with the benefit of the release to the debtors. But what the creditors release are the debts, with their incidents—the right to carry interest among others; and, consequently, what they ought to receive is satisfaction for their debts, with the incidents, if the estate of the debtors will extend so far. And it must be remembered that, though the debtors are released, the debts are not extinguished. The debtors are free, but only because the creditors have agreed to accept an assignment of their estate in lieu of a right of taking proceedings against them personally. But for the provisions of the Insolvent Act, debts carrying interest would have continued to do so during the course of the winding up; but those provisions, though they suspend, do not destroy the right to interest. That, according to the Act, subsists as a claim against the estate if any surplus remains after satisfying the debts which are proved. The fact, therefore, that the deed contains a release, confirms in my mind the inference that the word "debts" must be so interpreted as to include interest. The case was argued before us on the part of the respondents as though the words in the deed "such debts" had been equivalent to

"twenty shillings in the pound," or as though they implied a distinction between principal and interest, and limited the amount to be paid by the trustees to the former. But these words do not seem to me upon principle to be susceptible of any such construction. And the case of *Bateman* v. *Margerison*, which was not cited before His Honor the Commissioner is an express authority in support of the view I have taken, for that proceeded entirely upon the construction to be put upon the word "debts." Even, however, if I could assume that the words "such debts" were ambiguous, and capable of bearing the meaning which the learned Commissioner has attributed to them, or that they *prima facie* might bear such a meaning, we should still have to look to the whole sentence for the purpose of ascertaining what construction they were to receive, for it would be contrary to principle to isolate particular words, and draw a conclusion from their individual force apart from their relation to the whole passage in which they are found. The words of the deed are, "to apply and apportion the residue of such moneys in manner directed in Division VI. of the Insolvent Act * * * and, after payment of such debts, costs, charges, and expenses," &c., to distribute the surplus among the assignors. The primary duty of the trustees, consequently, is to apply and apportion the moneys produced by the estate of the debtors in manner directed in Division VI. of the Insolvent Act. Upon referring to that division, we do not find any express direction as to the application and the apportionment of the estate; but in Section 180 it is provided that the creditors shall "have the benefit * * * of all the provisions of the Act in the same or the like manner as if the debtor had been adjudged insolvent;" and one of the provisions of the Act is that interest shall be paid to the creditor before any surplus is handed over to the insolvent. It is true that the words I have just cited from Section 180 are qualified by the phrase "except when the contrary is declared or provided for by * * * the deed;" but it is assuming the very point in dispute to argue that the words "after payment of such debts" amount to such a contrary declaration, for the whole provisions of the deed must be read together, and if there is any apparent discrepancy

between different clauses, then, according to the well-known rule of construction, it would be the latter part that would be qualified and restrained by the former. It appears to me, however, that there is no such discrepancy; that the words "payment of such debts," read with the context, would mean such a payment as the creditor would be entitled to receive under the Act—such a payment as would result from the due apportionment and application of the moneys in such a manner as that the creditors might have all the benefits to which they would be entitled under any of the provisions of the Act. The appeal, therefore, must be allowed.

GWYNNE, J.—I hardly think it necessary to say that I concur in the judgment that has just been given. During the course of the arguments on the case I expressed my opinion so strongly, that it is unnecessary I should repeat it again; but I must say that I am glad to find that my learned colleague, the Chief Justice, has now come round to the view which I then expressed. This was a matter that is very rare, and somewhat unusual in any part of the world; for the estate not only paid twenty shillings in the pound, but left a large surplus. At the time the deed of assignment was made, it is clear that the fact of there being a surplus at all was not anticipated, and this is not surprising, as it is a most unusual circumstance, as far as New Holland is concerned. It must be said that the language of the deed is ambiguous, and that being so, the general law must prevail; and the general law of insolvency is that interest is to be paid on all debts carrying interest. The Act says the creditors under such a deed as the present shall have all the benefits, and be subject to the same regulations as if the case proceeded under insolvency, except when the deed expressly provided to the contrary; and as the law is not clearly departed from by the deed, though its somewhat ambiguous expression gave scope for a very pertinacious argument on the part of the learned *Attorney-General*, I am bound to hold that there is nothing which would justify me in a departure from the principles of the general law of insolvency. But, supposing that the deed did justify such a course, I should, notwithstanding the cases that have been cited, entertain very grave doubts as to the soundness of the proposition,

and I should be disposed to think it invalidated the deed. It is admitted that, under either view of the case, there must be a *cessio bonorum*, and how can that be done when a person fails to surrender a large portion of his property, and hold it back for his own benefit? If this matter goes further, I reserve to myself the right to give a more elaborate exposition of my views in writing.

Appeal allowed.

HANSON, C.J., GWYNNE, J., STOW, J.] [COMMON LAW.

9 JULY AND 18 AUGUST, 1875.

MURRAY AND OTHERS v. ACRAMAN AND OTHERS.

STORAGE RECEIPT.—Order and Disposition—Delivery—Possession—Insolvency.

The delivery of a storage receipt, standing in the name of the person delivering and transferring such receipt, does not operate as a delivery of possession, so as to take the goods out of the order and disposition of the person in whose name they stand, unless proof be given of a general custom on the part of purchasers of such goods to allow the same still to remain in such warehouse in the name of the vendor after completion of sale.

The plaintiff sold to A certain goods, receiving in payment three bills of exchange, payable at different dates.

The goods were delivered to a warehouseman on A's account, and a storage receipt forwarded to him.

Before the first bill became due, the plaintiffs renewed same at A's request, he endorsing to them the storage receipt as security; and the second bill was also renewed before maturity, and the storage receipt held as security for that bill also.

Before the third bill became due, the plaintiffs agreed, at A's request, to take back the goods, and retire the bills which had been endorsed by them to their bankers; and the plaintiffs accordingly instructed their bankers to pass the amount of the bills to their debit without presentment, but the bills themselves were not returned to A.

On action by the plaintiffs against the trustees of A's estate, under a deed made under Division VI. of the Insolvent Act, 1860, for the value of the cornsacks,

Held—per HANSON, C.J., and STOW, J.—*That the delivery of the storage receipt was not a delivery of the goods, but that the retirement of the bill by the plaintiffs was such a payment as to satisfy the Statute of Frauds.*

That the goods were in the order and disposition of A.

Per GWYNNE, J.—*That the retirement of the bills by the plaintiffs was a retirement on their own account, and necessary to enable them to carry out their agreement with A, but that A was not released from his liabilities on the bills, and that such retirement did not amount to payment within meaning of the Statute.*

RULE *nisi* calling upon the plaintiffs to show cause why the verdict should not be set aside, and (1) a nonsuit entered on the ground

that there was no contract to satisfy the Statute of Frauds, or (2) why a new trial should not be granted on the grounds (1) That the verdict was against the weight of evidence, (2) Misdirection.

The action was trover.

The plaintiffs sold to one Allen certain cornsacks, receiving in payment three bills of exchange, payable at different dates. The cornsacks were delivered by the plaintiffs to a warehouseman on Allen's account, and a delivery-order handed to Allen in respect of the goods.

Before the first bill became due, it was, at Allen's request, renewed by the plaintiffs, they receiving as security the delivery-order endorsed by Allen.

The second bill was renewed upon similar terms; and, before the third bill became due, Allen verbally agreed with the plaintiffs to re-sell to them the cornsacks on their taking up the bills; and the plaintiffs accordingly instructed their bankers, to whom the bills had been endorsed, to pass the amount to their debit, without presentment.

On motion for the rule, the following cases and authorities were cited:—

Farina v. *Home*, 16 L.J., Ex. 73
Exley v. *Inglis*, L.R., 3 Ex., 247
Nunes v. *Carter*, L.R., 1 P.C. C., 342
Ex parte *Blackburn* in re *Cheeseborough*, L.R., 12 Ex., 363
Smith's L.C., 21
Insolvency Act, 1860, sec. 32
Young v. *Fletcher*, 14 F. & F., 1081
Petty v. *Cooke*, L.R., 6 Q.B., 790
Knowles v. *Horsfall*, 5 B. & A., 134
Griffiths and Holmes on Bankruptcy, 460.

Thrupp now moved that the rule be made absolute.

The *Attorney-General (Way, Q.C.)*—The first question in showing cause against the rule with which I have to deal is, I think, this—whether or not the Statute of Frauds was satisfied. The Statute will not be satisfied by a mere delivery—

Farina v. *Holme*, 16 L.J., Ex., 73.

Something must be done in pursuance of the arrangement to take a case out of the Statute of Frauds—

Walker v. *Nussey*, 16 M. & W., 302.

If two parties meet and agree to a sale, and the purchase-money be paid over, that satisfies the Statute. If a third party be present, and the vendor directs the purchase-money to be paid to the third person, and it be so paid over, then the Statute is satisfied. It is not necessary that the purchase-money should be immediately paid into the hand of the vendor, nor direct to the third party. So long as it reaches their hands, the mediums may be infinite. (GWYNNE, J.—The test is, suppose an action were now brought upon these bills, what defence would Allen have?) The good defence that he had sold the goods in consideration of the bills being retired. (STOW, J.—Suppose the action were brought by the Bank?) He could plead payment. The Bank held the bills for the Messrs. Murray, and the arrangement was that they were to be retired. They were retired, and that ended his liability. (GWYNNE, J.—Only as between the Bank and the Messrs. Murray.) (STOW, J.—All I think the jury were entitled to infer from the evidence was that the Messrs. Murray, at the request of Allen, performed an operation which ought to have been done by the latter.) (GWYNNE, J.—I should be of the same opinion if the bills had been handed to Allen. Murray's were liable for the bills, they having been discounted by their bankers.) (STOW, J.—Yes, on this condition, that they had been presented, and dishonoured.) (HANSON, C.J.—If, on examination, Mr. Gordon had said—"Yes, it is true that we made such an arrangement, and we did retire the bills; our money went to satisfy the Bank," then he could not sue.)

(GWYNNE, J.—It appears to me there was nothing subsequent to the agreement. *Res inter alia acta.)* I would point out that it is a mere accident that Messrs. Murray's name came on the bill. (GWYNNE, J.—The question is—Did that arrangement involve a payment? In my opinion, it did not.) Could anybody contend that Allen's debt was not extinguished? The next question is—Were the goods in the order and disposition of Allen? And with that, to a great extent, is mixed up the question of reputed ownership. If there had been a lien, then the goods could not have been in the possession of Allen. (GWYNNE, J,—I always thought lien implied possession.) It may be a constructive possession. A bill of lading only gives constructive possession. (GWYNNE, J.—But it passes the property.) It may be endorsed so as to pass the property, but, for the purposes of merely creating a pledge, it is merely constructive. It is not necessary there should be an actual manual possession. (GWYNNE, J.—But he has it in his power to take possession just the same as if he had the key of a warehouse. What you mean, is, that it was not in his physical apprehension.) As your Honor pleases. I submit that the cases, as regards the creation of a pledge, have not been touched by the decision in *Farina* v. *Holme*—

Folkard on Pledges, 13
Story on Bailments.

(GWYNNE, J.—Then, if what you have quoted be the case, Murray should have gone to Main, and be attorned.) No, it only shows the means for doing it—

Greening v. *Clarke*, 4 B. & C., 316.

There is the case—

Lucas v. *Dorrien*, 1 Moore 29, 7 Taunt., 278.

(STOW, J.—That was overruled by *Farina* v. *Home*, *vide* Benjamin on Sales.) Not actually. There is a great conflict between

these two cases. *Farina* v. *Home* applied to the Factors Act. The present case, as I have said, involves the question of reputed ownership. (STOW, J.—That point may have been submitted to the Court during the trial, but was never presented to the jury. I withdrew everything concerning that from their consideration. I think the point is this—Did the evidence take the arrangement out of the Statute of Frauds? If yes, then no nonsuit; if no, then a nonsuit, unless the Court be of opinion that there was a pledge—then a new trial. If the Court holds that there was a pledge, then whether it was in the possession and reputed ownership of Allen.) Very slight evidence is sufficient to take the case out of the reputed ownership. If a thing is in the possession of a person, he is taken to be the reputed owner, unless evidence to the contrary be given. Very slight evidence is required. Chief Baron POLLOCK said in a case that the doctrine of reputed ownership had gone out of fashion for the last forty years; and, in the opinion of Vice-Chancellor Knight BRUCE, it has really done more injustice than would have been brought about by the evil the doctrine intended to remedy. Very slight evidence to refute the doctrine of ownership by possession is required in the case of a tradesman letting out pianofortes or furniture on hire. So, also, when goods are in course of manufacture, very slight evidence is necessary to show that it is the custom of trade to pay part of the price before the goods are actually delivered; and very slight evidence is required, also, to prove even the custom of leaving the goods in the hands of the vendor, though the price has been paid, to rebut the presumption that because the goods are in the hands of the vendor he must be the reputed owner. Now, in this case, the evidence as to custom is unrebutted; and surely, when it has been shown that it is the custom of trade here to deal with these warehouse receipts, and to pass them from hand to hand by endorsement, without notice to the warehousekeeper, the presumption that the reputed ownership remains in the original depositor must be rebutted. As regards the custom of the trade, the evidence was all one way, and in my favour. And I submit the question of reputed ownership is one entirely for the jury. It is a question of fact, and cannot be made a question of law; and what Mr. Justice STOW said at the

trial was nothing more than the strong opinion which any Judge is entitled to hold upon any question of fact that comes before him. The only result of the expression of that strong opinion was that it put the plaintiff to a greater difficulty in obtaining a verdict than he otherwise would have had. (STOW, J.—My impression was, and is, that there was no proof of the prevalence of the custom or usage of trade as set up by you.) (GWYNNE, J.—But, under the Bankruptcy Law, possession involves a question of fact and of law, combined. If I send my watch to be repaired, and the watchmaker becomes bankrupt or insolvent, the assignee seizes my watch, and the matter comes before a jury. I venture to think that the jury would be told that, though the question of fact was left to them to decide, still the doctrine of reputed ownership could not arise, as it is well-known that a watchmaker has constantly the property of others in his possession. In the case of wine sold, and yet retained in the vaults of the vendor, it was shown that the particular custom of the wine trade in Bristol for fifty years had been that goods should be sold, and yet retained in the possession of the vendor.) I would call your Honor's attention to Section 82 of the Insolvent Act. (GWYNNE, J.—Do you think that that would be an answer to an action against a man for trover?) It is not a question whether it would be an answer to an action, but whether in law or equity a man can be entitled to possession without performance of the contract. There is a special contract that the bearer of a given instrument, if properly executed, can obtain goods deposited by somebody else. (STOW, J.—That simply amounts to an offer to give the goods to any nominee of Allen. I believe, in reply to a question of His Honor Mr. Justice GWYNNE, that, supposing such an action as he has mentioned was not restrained by a bill in equity, then, by a proper plea, this receipt would be a good answer by an action for trover. The fact that these instruments can be passed from hand to hand without notice to the warehousemen, is the best proof that there is no presumption in his mind that the original depositor remains the reputed owner, and it is only a fair inference for an intelligent mercantile man to draw that marketable goods would not lie in his store for months without there being dealings respecting the same; and the jury

felt that a contract of that kind did not infer possession in the original depositor.) (GWYNNE, J.—That could not have been put before them by the Judge, unless it was shown that the general law of England had been set aside by some custom of trade that had been in existence for five years.) It was shown to have existed since 1854. (STOW, J.—The evidence at the trial was to the effect of the endorsement, not as to the existence of the custom.) It is not a question of immemorial custom, and I submit it exists, and that it is immaterial whether it has existed for fifty years, months, or days. (GWYNNE, J.—I differ from you *in toto*.) STOW, J.—I think if a usage be shown to exist—it matters not for never so short a time—and is universal in a particular trade, it could be brought in evidence to rebut the presumption of reputed ownership.) That is my view—

Ex parte *Rose*, 2 Mont., D., and De G., 131

In re *Styan* v. *Smith*—Failure of notice to an Insurance Company of the assignment of a policy not sufficient to give assignees possession, *ibid*, 219

Ex parte *Heathcoate*, ibid, 711

Ex parte *Vaux*, 30 L.T., N.S., 739.

(GWYNNE, J.—There is a case in which Lord SELBOURNE puts the whole matter most clearly, and in a most masterly way. Suppose a man in trade puts up a board—"Take notice, all parties coming here, that of the goods in this store some belong to me, some to other persons, and some to my customers;" and he says that a notice equally strong to that must be given the public to prove the custom in a trade.) (HANSON, C.J.—I think the question is, whether the endorsement of this receipt passes, as well the legal right as an equitable interest in the property, and whether such would rebut the presumption that Allen was the owner by the Messrs. Main having originally given their receipt to him.) (GWYNNE, J.—I can only take the receipt as an expression of willingness to part with the goods to any nominee of Allen's.) The receipt can pass from hand to hand, and its possession, I submit, creates an equitable right—

Ex parte *Ward*, 28 L.T., N.S., 793, 8 L.R., Chan., 144
Langton v. *Waring*, 11 L.T., N.S., 633
Martin v. *Reid*, 11 C.B., N.S., 730; 31 L.J., C.P., 126.

If the passing of the receipt confers an equitable right upon the holder, then the presumption of reputed ownership is rebutted. (STOW, J.—It comes round to the same thing. The goods could only be released by consent of the equitable holder, instead of by the consent of the reputed owner)—

Bentall v. *Burn*, 3 B. & C., 423.

I think no notice being required to be given to the warehouse-keeper is a fair presumption that the doctrine of reputed ownership is not admitted by him—

Fraser v. *Evans*, 6 N.S.W. Reports, 325,

for a breach of warranty and ownership—

Farina v. *Home* (ante),

and cases included therein there reviewed. The case of

Greening v. *Clarke*, 4 B. & C., 316,

is untouched by *Farina* v. *Home*—

Ex parte *Davenport*, 1 Deac. and Chit., 397,

and a case, name not mentioned, referring to dealings with East India Company's Dock warrants. (GWYNNE, J.—They were deemed to act as law, there being a special custom of that particular Company.) Like any other custom of trade. It is not one of immemorial usage—

Lucas v. *Dorrien* (ante).

Though the decisions in

Farina v. *Home* and
Greening v. *Clarke*

are inconsistent, yet the latter is untouched, and is incapable of being touched by the later decision. I am quite ready to admit that it has been pointed out in

Griffiths and Holme's Work on Bankruptcy

that it can be shaken on another ground. (STOW, J.—There is the case of

Fuentes v. *Montis*, 4 L.R., C.P., 93; 38 L.L., C.P. 95; 19 L.T., N.S., 364; 17 W.R., 208).

Yes; but I cannot see anything in the case, at least as it is reported, to warrant Mr. Benjamin in saying that the law places the relation between vendor and vendee on one footing and the Legislature on another, and that this anomalous state of things should be removed by more satisfactory legislation—

Knowles v. *Horsfall* (ante)
Ridout v. *Lloyd*, Mont., 103
Johnson v. *Stear*, 15 Com. Bench, N.S., 330.

(STOW, J.—Though we shall consider that case with great respect, still it cannot be binding upon us. Besides, there are cases in Melbourne on the same point, and a different decision was taken.) Yes; there are the cases of

Lorimer v. *Cleve, Webb, Wyatt, and a'Beckett*, 1865, 223
Moss v. *Grice*, ibid., 230.

The last of these two cases is similar to the South Australian case

Christie v. *Cherry* (not reported).

I would also refer to

Bartlett v. *Holmes*, 13 C.B., 630
Ackard v. *Ring and Others*, 31 L.J., N.S., 647.

That is a very important case as to custom. Then there is the further point that this Act was done in contemplation of bankruptcy. But what is the evidence on that point? The evidence was called by the defendants themselves, and it showed that this arrangement, so far from being an attempt to benefit the creditor, was to secure a benefit to the debtor, and so benefit the estate. (GWYNNE, J.—It was done voluntarily, and was not an action in the ordinary course of trade. Those are two of the attributes of a fraudulent preference.) That is not sufficient. It must be done in contemplation of bankruptcy—

Deacon, 607.

He says in evidence that he had every hope of going on, and that it was to save £40 that he made the bargain. And as for the transaction not being one in the ordinary course of business, that is an error. He bought the cornsacks with the intention of using them for his own business. He finds he has no use for them as he expected, and he disposes of them. Surely, it is in the ordinary course of business for a man to dispose of that for which he has no use. On these grounds, therefore, I venture to submit that the verdict was correct, and that this rule should be discharged rather than made absolute.

Ingleby, on the same side.—If the defendants succeed in proving that there was a fraudulent preference, the debt still remains for which the debtor was indebted to the plaintiffs. He has not, if they prove their point, been discharged by the transaction that has taken place, and the plaintiffs could prove on the estate. (STOW, J.—But that cannot affect our judgment.) If the debt still remains, then the deed is void, and the defendants have no *locus standi*. (STOW, J.—I don't quite see that it would. They buy

these cornsacks and pay for them, and they allow these goods to remain in the order and disposition of the insolvent.) But if the debt remains, the deed would be bad, because there would not then be a sufficient number of assents. Their victory to-day must be a barren one, and I venture to submit that the Court has the power to hesitate in granting a new trial when it is apparent, as it must be in this case, that the defendant cannot possibly succeed. If it were a question of misdirection by the Judge to the jury, it would be a different matter, but all that is here contended is that the jury wrongly decided the issues of fact submitted to their consideration—

Load v. *Green*, 15 M. & W., 216.

By that case it will be seen that the reputed owner is the person who holds the symbols of property. It would be necessary, too, on that decision, to enquire what was the state of Mr. Gordon's mind at the time he took back these cornsacks, for it says the thing must not be done "unconscientiously." Now, is there any proof that such was the case after Allen has sworn that he had every hope of going on? The defendants are precluded from discrediting their own witness. As has been said in

Lucas v. *Dorrien* (ante),

the Judges are always stopped by juries in the construction that they put upon these mercantile transactions; and I venture to say, that if there were fifty trials of this action, the result in each would be the same as that complained against. Such being the case, the judgment of the Court, if in favour of the defendants, can only confer a barren victory, and one worse than a defeat.

Thrupp, and *J. W. Downer*, in support of the rule, were not called upon.

Cur. ad. vult.

18 August—

Judgment was now delivered as follows:—

STOW, J.—This is an action tried before me, at the April Civil Sittings, in which the plaintiffs seek to recover from the defendants thirty bales of corn-sacks or their value. The plaintiffs' evidence showed that towards the end of 1873 they sold the sacks in question to Mr. Richard Allen, jun., and received in payment three acceptances for £160 8s. 4d. each. The sacks were delivered by the plaintiffs, on account of Allen, to Messrs. R. & R. Main, warehousekeepers, at Port Adelaide, and they gave Allen a warehouse receipt, whereby the sacks were made deliverable only on the production of the receipt, endorsed by Allen. Allen, shortly before the first bill became due, and in February, 1874, agreed with the plaintiffs, in consideration of their renewing that bill, to deposit the storage receipt for the sacks as security for the renewal; and again, just before the 8th of March, on which day the second bill became due, Allen and the plaintiffs agreed that that bill also should be renewed, and the storage receipt be held by the plaintiffs as a security for that as well as the first renewed bill. The storage receipt endorsed by Allen was, according to the evidence of Mr. Gordon, one of the plaintiffs, handed to them by Allen, pursuant to his agreement with them, the two bills having been renewed. A short time before the 9th of May, the day on which the third bill became due, Allen called on Mr. Gordon, and proposed that the plaintiffs should withdraw the bills and take the sacks back, the storage receipts being then in the plaintiffs' possession; and to this the plaintiffs, through Gordon, agreed. Mr. Gordon gave evidence that the third bill was retired on the 9th of May, the day on which it became due; and in cross-examination said that the Bank had notice to retire the bills and debit them to the plaintiffs, and instructions either not to present the bills or to debit them to the plaintiffs, but the bills were left in the Bank. The plaintiffs also called several witnesses to prove a custom that warehoused goods held under receipts like that given in this case passed from hand to hand by delivery of the receipt endorsed by the original

depositor. The evidence on this point, however, was not conclusive, as the custom was not stated to have existed for more than five years; and one of the witnesses stated that he had doubts as to the goods passing in this way, by his admission that it was only when they had no doubt as to the position of the depositor that they were content to hold the endorsed certificates without notice to the warehouseman, and his attornment. Proof of the conversion of the goods by the defendants having been given, the plaintiffs' case closed; and counsel for the defendants moved for a nonsuit, on the ground that the agreement between Allen and the plaintiffs, that they should take back the sacks and withdraw the bills, was a contract for the sale of goods, of the value of £10 and upwards, on which no action could be maintained, as there was nothing to take it out of the operation of the 17th section of the Statute of Frauds; and the contract of sale being for these reasons, incapable of proof, there was no case made by the plaintiffs, as the evidence to support a pledge failed, because the goods had never come into the possession of the plaintiffs. I held that there was evidence of part payment under the contract for sale, but reserved to the defendants liberty to move to enter a nonsuit on the ground that there was no evidence to support the plaintiffs' case. Besides the objection that the plaintiffs had not shown any title to the sacks, either under the contract for sale or that for a pledge, the defendants claimed as trustees of a deed executed by Allen on the 12th of May, 1874, and perfected under the 6th Division of the Insolvent Act, 1860, as a deed of arrangement for the benefit of his creditors, and they maintained that the goods, if the property of the plaintiffs, were at the date of the execution of that deed in the possession, order, or disposition of Allen as reputed owner, with the consent of the true owners; and also that the contract of resale was a fraudulent preference by Allen to the plaintiffs. In answer to questions put by me, the jury found that the plaintiffs paid the bill falling due on the 9th May before the 12th of that month, the day on which the insolvent deed was executed; that the goods were not in the possession, order, or disposition of Allen, as reputed owner, with the consent of the plaintiffs; and that Allen did not make the contract of resale voluntarily, or in contem-

plation of insolvency, or with a view to prefer the plaintiffs; upon which I directed a verdict for the plaintiffs, with £350 damages, the amount agreed on as the value of the sacks. The defendants moved to set aside the verdict, and that a nonsuit should be entered pursuant to the leave reserved, or that there should be a new trial, on the ground that the verdict was against evidence. Upon the first point, the defendants' counsel insist that the contract itself is the only evidence of the payment, and that although, if that contract had been provable, the agreement to take back the goods, and free Allen from lialility on the bills, would have been a payment of those bills; yet, that when the payment is to be proved as a means of taking a verbal contract out of the operation of the Statute of Frauds, that payment must be proved otherwise than by the mere proof of the verbal contract itself; and the case of *Walker* v. *Nussey*, 16 M. & W., 302, was relied on as an authority for this proposition; and I agree that if the bills had been in the hands of the plaintiffs, that the case would have been a decision in the defendants' favour, and that, in order to satisfy the Statute, there must be proof not only of the verbal contract, but of something more—namely, an earnest, or payment, or a delivery of the goods, or of some part of them, and that this must be substantiated by something independent of the effect of the contract itself. But it seems to me, that the evidence of the agreement between Allen and the plaintiffs that the bills should be retired by the plaintiffs, and that they were retired by them under instructions to the Bank to place them to the plaintiffs' debit with the Bank, entitled the jury to infer that the bill in question, one of those which was to be withdrawn, as against Allen, was, at the time of the contract of resale, in the possession of the Bank as owners, and that it was paid by the plaintiffs. It is true, that whether the bill, by its transfer to the debit of the plaintiffs was paid, might depend upon the state of the plaintiffs' account with the Bank; and it might have appeared on cross-examination that the account was a debit, but, in the absence of any cross-examination upon that point, the jury, in my opinion, might find that the bill had been paid; and this fact would supply the independent proof which is required to take the case out of the Statute. It was suggested at the Bar that

the plaintiffs, in paying the bill to the Bank, were only doing that which by their endorsement they were bound to do on their own account, and therefore, that there was no payment on behalf of Allen; but the contract arising from the plaintiffs' endorsement of the bill was, not that the plaintiffs would pay the bill when due, but that, if Allen did not, on its being properly presented, pay the the bill, and if the Bank gave them due notice of the dishonour, they would pay it. The debt arising from the bill was Allen's; and if, on presentment, the plaintiffs paid it, in order to complete their contract with Allen for the repurchase of the sacks, he would have a defence to any action upon the bill; and the non-delivery of the bill to Allen, or the plaintiffs, which was referred to by the defendants' counsel, although it might cause some difficulty to Allen in proving the facts, would not have the effect of rendering him liable, or of continuing his liability, either to the Bank or the plaintiffs if, as the jury might well find, the plaintiffs, on Allen's behalf, paid the bill; and if it got into the hands of a third person, he, becoming possessed of it after it had matured, would have no better cause of action than the plaintiffs or the Bank. Therefore, I could not properly have withdrawn the case from the consideration of the jury, there being evidence of a part payment on account of the contract of sale. This opinion relieves me from considering at this stage whether there was a pledge of the goods to the plaintiffs. As regards the application for a new trial, the evidence shows that the sacks, at the date of arrangement, were in the hands of Messrs. Main, who held them as warehousemen under the storage receipt before referred to; and they had then no notice of the resale to the plaintiffs. The plaintiffs' case is, that the goods were not then in the possession, order, or disposition of Allen, but were in the possession of the plaintiffs themselves, by reason of the delivery by Allen to them of the endorsed receipt, in order to give them a security over the goods for the renewed bills; and if possession was transferred from Allen to the plaintiffs by that means, the pledge would be complete; and then the plaintiffs, being at the time of the insolvency in the possession of the goods, and holding them either under the contract of pledge or the subsequent contract of sale, would be entitled to recover for their

conversion by the defendants. It appears to have been considered at one time that a custom to transfer goods from hand to hand, by the delivery of the warehouse receipts, endorsed by the original depositor, would be upheld, and that the possession of goods would be held, on proof of such a custom, to pass by that means, and the case of *Lucas* v. *Dorrieu*, and some other cases affirmed that view; but the later authorities have decided that no such custom can be maintained; that although bills of lading may be treated as the symbols of property, and their delivery from hand to hand transfers the possession of the goods, from the necessity of the thing, the goods represented by those documents, being in course of transit, and incapable of actual delivery; and those documents also being ancient documents, the transactions affecting which are regulated by the *Lex Mercatoria*, which recognised such a mode of transferring possession of goods, and which is part of the Common Law of England; yet, that warehouse certificates, being documents first used in mercantile transactions in modern times, their delivery from hand to hand, however they may be worded, cannot operate as a symbolical transfer of possession. This was decided in *Farina* v. *Home*. Mr. Benjamin, in his Book on Sales—a work continually referred to by counsel and judges in England—gives very strong reasons why the delivery of an endorsed certificate, such as that used in the present case, should be held to operate as a transfer of the possession of goods, as he thinks that the warehouse-keeper should be taken to have promised in advance to hold the goods on account of any one dealing with them, and also the receipt properly endorsed; but he admits that the case of *Farina* v. *Home*, in which all the previous authorities were referred to, is decisive of the inability of persons so to contract, and that nothing but legislation can enable them to do so. Cases have been quoted which have been decided in the Supreme Courts of New South Wales and Victoria; in the former, affirming contrary, as it appears to me, to the English authorities, that a custom of that sort may cause the delivery of an endorsed storage receipt to transfer the possession of the goods which it represents, and the latter Court deciding in accordance with *Farina* v. *Home*. Although not biassed by the

decisions of those Courts, I should consider their decisions with respect, but should prefer to act on cases decided in the English Courts; and, acting on their decisions, I hold that there can be no universal custom of merchants, either of the whole province, or of any particular place of it, having the effect contended for by the plaintiffs. It is necessary to consider whether the custom of a particular trade might enable the transfer of possession of goods to be effected by the delivery of storage receipts from hand to hand, because the evidence offered in this case was not of the usage of a particular trade, but a universal custom at Port Adelaide. I am of opinion that there was no pledge proved, inasmuch as that which was essential to it—namely, the transfer of possession of the goods —was wanting. The transaction regarding the renewal of the bills was no more than an agreement to pledge the goods, which had no operation in their possession, and amounted to no more than a license, which was never acted on, and became revoked by the insolvency. But I do not think that the defendants could use the evidence as to the pledge in any way to support their verdict, even if proof of the alleged custom would entitle them to a verdict, because the question was withdrawn by me from the consideration of the jury. It may be, that when a verdict is held to be against the weight of evidence on one point, the Court may refuse to grant a new trial if they find that facts set up in the trial, but erroneously withdrawn from the consideration of the jury, were so conclusively proved as that the jury ought in law to have found for the party holding the verdict; but in the present case there was evidence both ways—on the question of law and as to the existence of the custom, and the point thus in dispute could not properly have been decided by the Judge, but must have been submitted to the jury. The next question is, whether the goods were in the possession of Allen, as reputed owner, and the question of repute depends upon whether the goods were held under such circumstances as that persons cognizant of those circumstances would consider Allen to be the owner, and the fact that the goods were standing in the name of Allen in the warehouseman's books would lead to the conclusion that they were his, unless a general custom to leave goods of that description when sold in the hands

of the warehouseman, without a transfer into the name of the purchaser, were proved, and would rebut the presumption of repute arising from the goods being in the possession of the insolvent. The plaintiffs allege that this was proved; I do not think that it was so. The evidence of a custom that the goods passed by delivery from hand to hand of an endorsed receipt was all that was offered; and though from a general usage, a belief that the delivery of an endorsed receipt transferred the possession, it might be inferred that the goods would be left in the hands of the warehouseman after sale, without a transfer into the name of the purchaser, yet the particular usage relied on as rebutting the *prima facie* case of repute was not specifically set up or alluded to until all the evidence had been taken. It would be unfair, as it seems to me, to allow the verdict to stand upon this point when the attention of the defendants was not, until it was too late for them to cross-examine or offer rebutting evidence, directed to this aspect of the plaintiffs' case. In addition to this, the question of the existence of this usage was not submitted to the jury, and certainly was not proved so clearly as to have rendered it the duty of the jury to find it proved. I think, therefore, that the jury, in finding that the goods were not in the possession, order, or disposition of Allen, as reputed owner with the consent of the true owner, found a verdict against evidence, and that there ought to be a new trial; and that being so, I offer no opinion upon the other point, viz., that of fraudulent preference, on which the verdict is said to be against evidence. The rule, so far as it asks that a nonsuit should be granted, should, in my opinion, be discharged; and so far as it asks for a new trial, should be made absolute.

GWYNNE, J.—This was a rule to show cause amongst other things, why the verdict obtained should not be set aside and a nonsuit entered, on the ground that there was no evidence to go to the jury in support of the plaintiffs' case. As the facts of this case were so fully gone into on the motion for a new trial which has been already granted, I think it will not be necessary to refer to those facts again, except in a very cursory manner. Towards the end of the year 1873, the plaintiffs sold to one Allen a quantity

of cornsacks; the sacks were delivered to Allen, and he accepted then several bills of exchange drawn by the plaintiffs upon him for the price, payable at different times. Allen being unable to pay the first bill, it was for his convenience renewed by the plaintiffs, and so of the second bill. A short time before the third bill became due, Allen being unable to meet it, a proposal was made by him and accepted by the plaintiffs for a resale to them of the sacks. The consideration of the resale was that the debt due by Allen to the plaintiffs as the price of the sacks and represented by the bills should be extinguished. The evidence on this point is as follows:—John Gordon, one of the plaintiffs, states—"Allen saw me again. He said he felt himself rather in difficulties, and proposed that we should withdraw the bills and take the sacks back, of which we already held the storage receipts, and I agreed to do so. The first original bill was retired by us on 23rd February, 1874, the next (two originals) on 9th March, and the next on the 9th May. The renewals of the first and second bills were retired on 23rd May and 9th June respectively." On cross-examination Mr. Gordon says—"The Bank had notice to retire the bills and debit them to us. I instructed the Bank either not to present the bills or to debit them to us. The bill due June 8 was presented for payment by mistake, either by the Bank clerk or our bookkeeper. The bills were left in the Bank. Bills are never removed unless specially required." Mr. Allen was called; and I only refer to his evidence to show that he looked upon the transaction as a resale. He says—"Mr. Gordon agreed to take the sacks back and to retire the bills. I have no doubt when I resold the bags to the plaintiffs that I should be able to go on." My learned colleague, on the application of *Mr. Thrupp* for a nonsuit, observed—"I decline to nonsuit on the ground that there is evidence to go to the jury of a contract satisfying the Statute of Frauds for the sale of the goods by Allen to the plaintiffs." It is clear, therefore, that the parties to the verbal contract, and also the learned Judge, looked upon it as a contract of sale of the bags by Allen to the plaintiffs. The banker was not called, and there was no precise proof whether the bills were discounted or not, nor whether the banker debited the plaintiffs' account with the bills,

although there is the evidence of Mr. Gordon as to the instructions given by the plaintiffs to the Bank. I assume, however, for the present purpose that the bills were discounted by the plaintiffs, and that after the contract with Allen they were at plaintiffs' request placed to their debit by the Bank. On the part of the defendants, it is contended that the above facts show no part payment by the plaintiffs to Allen, or anything equivalent to part payment, so as to satisfy the 17th section of the Statute of Frauds—29 Car. 2, c. 3. The contract was a verbal one, and unless there was a part payment it was necessary that it should have been reduced to writing. Allen was the acceptor of the bills, and not entitled to any notice of dishonour, and therefore not discharged for want of it. The plaintiffs were parties to the bill (presumably drawers and endorsers), and therefore, after the making of the contract, were by its terms bound to retire the bills as a preliminary step to enable them to perform their engagement with Allen. The act of retiring the bills thus became their own sole affair. Had the facts been different—as, for instance, had the plaintiffs not been parties to the bills—then I could not say that the payment, being at Allen's request, would not be a payment sufficient to satisfy the Statute. But it is clear law that to bind a buyer of goods of £10 value without writing, he must do two things—first, make a contract; and next, he must have given something as earnest or in part payment or discharge of his liability (per ALDERSON, B., in *Walker* v. *Nussey*). It was, therefore, as it seems to me, incumbent upon the plaintiffs in the present case to have done something more than the mere getting of the bills from the Bank. They should in some manner have discharged Allen in part or whole from his liability upon them. They should, for instance, have sent to him the bills themselves, or a receipt for their amount, or a release. However, they did nothing in discharge. After the verbal contract, no direct communication whatever appears to have taken place between the plaintiffs and Allen. I say "direct," because I wish pointedly to refer to the transactions which took place between the plaintiffs and their banker, and which is relied upon by the plaintiffs as satisfying the requirements of the Statute of Frauds. As to that transaction, then, it appears to me, that as

by the contract it was evidently intended by both the plaintiffs and Allen that all obligation on the bills should be assumed by the plaintiffs, and that Allen should be discharged therefrom, the payment or retiring the bills by the plaintiffs was not a payment at the request or on account of Allen, but, as I have already said, it was a payment on the plaintiffs' own behalf, and was rendered necessary in order to enable them to carry out the contract into which they had entered with Allen. Then, as it is clear that notwithstanding the retirement of the bills Allen still remained liable upon them as acceptor, though in the hands of the plaintiffs, I cannot understand how there could be anything equivalent to a part payment. The present case would seem to be governed by the principles laid down by the Court of Exchequer in the case of *Walker* v. *Nussey*. The test question there asked by PARKE, B., and which really decided that case—"When was the plaintiff's debt to the defendant satisfied so as to be the subject of a plea of payment had the defendant sued him?"—is expressly applicable to the present case. And I would ask if the plaintiffs had sued Allen on the bills, when was Allen's debt on the bills satisfied so as to be the subject of a plea of payment? I think the answer would be never. As it therefore appears to me, that Allen but for his insolvency could have been sued by the plaintiffs upon their bills, and could not have rebutted the claim by a plea of payment, and that as they are still entitled to prove upon his estate in respect of the bills, I think there has been no extinguishment in part or whole of Allen's obligation on the bills, and consequently that no part payment, or anything equivalent thereto, has taken place between the plaintiffs and Allen. I have, therefore, after careful consideration of all the facts contained in my learned colleague's notes, come to the conclusion that there is not any sufficient evidence to show a part payment so as to satisfy the 17th Section of the Statute of Frauds, and therefore that the rule for a nonsuit should be made absolute.

HANSON, C.J.—In this case, I am of opinion that the rule obtained by the defendants should be made absolute for a new trial, and discharged so far as it relates to the nonsuit. It is

not necessary to recapitulate the facts of the case, which have been already fully set out in the judgment of my learned colleague Mr. Justice Srow, which I had an opportunity of reading, and in which I fully concur; nor do I deem it necessary to say anything further as to the new trial, for on that point we are all agreed. With regard to the nonsuit, it was argued on the part of the defendants that the retiring of the bills by the plaintiffs did not amount to a payment so as to satisfy the Statute of Frauds, on two grounds—firstly, that Allen was not freed from his liability upon the bills; and secondly, that, assuming the third bill to have been satisfied, the plaintiffs, who were bound as drawers to pay to the receivers as discounters, if Allen made default, could not apply such a payment to the contract. But it seems to me that neither of these objections could form any valid ground for nonsuit, for both raised questions which it was the province of the jury to determine. Upon the unquestioned evidence of the plaintiffs, it was competent for the jury to infer, as they did infer, that the claim of the bankers in respect to the third bill was satisfied, so that they could not have any further remedy against Allen, in which case there would be a fresh payment under the contract to a third party at the request of the vendor, which would be equivalent to a payment to the vendor himself, and would satisfy the Statute. And if the plaintiffs had afterwards sued Allen on these bills, he might have successfully defended such an action upon his own evidence and that of the plaintiffs. And so, with regard to the liability, it might have been argued that, as a matter of fact, the retiring of the third bill was not an act done under the contract for resale, but only a discharge of an obligation which the plaintiffs, as drawers, had incurred to the Bank as holders of the bill for value. But that would have been a question which it was the duty of the Judge to submit to the jury, for there was nothing in the circumstances, as detailed in evidence, to necessitate such a conclusion. That a drawer of a bill for value should pay it to the holders without requiring it to be presented would, on the contrary, rather raise an inference that he was paying it under some new arrangement with the acceptor, for such an act was not required by his position, either with relation to the holder or to

the acceptor. It would, therefore, be strong evidence of the existence of some new duty on his part, such a duty as might be created by the contract of resale alleged in the present instance; and, at any rate, the circumstance that the drawer might be ultimately liable could not be held necessarily to qualify or to determine the ground of a payment made by him before his liability had arisen. I think, therefore, that the learned Judge was right in refusing to nonsuit and in submitting this question to the jury, and I see no ground to be dissatisfied with their verdict in this particular.

Rule absolute for new trial, discharged as to nonsuit.

HANSON, C.J., GWYNNE, J., STOW, J.] [COMMON LAW.

18 AUGUST AND 1 SEPTEMBER, 1875.

IN THE GOODS OF ALEXANDER PATTERSON, DECEASED.

ADMINISTRATOR.—Commission—Real Estate.

Per HANSON, C.J., and STOW, J.—GWYNNE, J., *dissentiente*—*Commission is allowable under the Testamentary Causes Act to an Administrator on the Real as well as on the Personal estate administered by him under Letters of Administration.*

APPLICATION for allowance of commission on real estate administered under letters of administration.

Barlow, for the administrator, quoted

2 Fonblanque on Equity (5th Ed.), 401,

and also

Williams on Executors (7th Ed.), 1656,

to show that whatever came into the hands of parties administering the estates must be considered in law an asset.

Cur. ad. vult.

1 September—

Judgment was now delivered as follows:—

HANSON, C.J.—This is an application by an administrator for an allowance of commission in respect of realty which has been administered by him under the letters of administration, and the question is, whether it comes within the definition of the word "effects" in the Act of 1865. It appears to me that when an Act is passed for the purpose of enabling the Court to remunerate a person to whom the Court has confided the discharge of a certain duty for the trouble which he

incurs, and afterwards an alteration of law, so as to enable such Court to include within its scope certain property, which previously was not so included, and which, therefore, enlarges the duties and responsibilities of the administrator, it is obvious that the change in the law is to be accompanied by a change in the remuneration, so that the amount of remuneration be made to increase correspondingly with the increase of the property in respect of the administration on which the remuneration is given. It seems to me that the words of the Act are sufficiently large to allow that interpretation, and I am, therefore, of opinion that commission should be allowed in respect of realty administered by the administrator, as well as in respect of personalty.

GWYNNE, J.—It appears to me by a reading of the Testamentary Causes Act that the commission of the administrator is to be paid out of the "effects" of the deceased, meaning thereby, in my opinion, his personal effects. The earnings of the administrator can only arise out of the administration of the effects, and nothing else. It is that which entitles him to his commission; and, in my opinion, "effects" means personal effects, and nothing else, and he would have no jurisdiction over land or anything else besides personal estate. Up to the time of the passing of the Law of Inheritance there was not provided in the law any reward for trustees or any person dealing with land. Then comes the Testamentary Causes Act, which may be said to have, to a certain extent, in a certain mode and form, and for certain purposes, allowed land to be converted into assets; but, for all that, I do not see how an Act passed long afterwards can alter the construction of the first Act. I fail to see any impropriety in the course proposed, for, doubtless, it would make the two laws balance and harmonize; but that is not the question. The question is, whether this is law; and, though I would rather agree than differ with my colleagues, that is contrary to the opinion I have long held and acted upon, and which opinion I still believe to be right; and I must therefore say that I do not not see how this commission can be granted.

STOW, J.—I am of opinion that the commission should be

allowed. The Testamentary Causes Act enables a Judge to give to the administrator of the effects of a deceased some remuneration for his pains and trouble. This remuneration shall be paid out of the assets of the estate; but all difficulty is removed by the way in which the Law of Inheritance treats land, and makes it part of the assets of a man just as much as his personal estate. There is no doubt that the Court has power to grant the commission, and, in this case, I think the commission should be five per cent. I have looked into the petition and the affidavits, and I find that the administrator is an auctioneer; that he sold the land without making any charge; and that if he had sent in his bill, the expenses would have, at the least, amounted to five per cent. I think, therefore, he is entitled to the amount of the commission, and also to five guineas, the cost of the application.

Order accordingly made.

HANSON, C.J., GWYNNE, J., STOW, J.] [COMMON LAW.

25 AUGUST AND 1 SEPTEMBER, 1875.

O'HALLORAN v. COLGAN.

APPEAL.—Bailiff of Local Court—Attorney—Party to cause.

A Bailiff of a Local Court who has seized goods under execution, at the instance of the judgment creditor or his attorney, may, on such goods being surrendered in consequence of notice of appeal having been given, forthwith sue such judgment creditor for his expenses, without awaiting the event of the appeal.

The client, and not the attorney, is liable for fees payable to a bailiff, acting not by virtue of a special employment, but in the execution of his duty.

APPEAL from the Local Court of Palmerston, in a special case setting out the following facts:—

The plaintiff, as bailiff of the Local Court of Palmerston, seised at the request of the defendant certain goods of one De La Tour to satisfy a judgment of £120, recovered against him by the present defendant. Subsequently, De La Tour having given notice of appeal, and a bond having been entered into for the due prosecution of the appeal, the present plaintiff surrendered the goods and sued the present defendant for his expenses. A verdict was entered for the plaintiff, with leave reserved to set aside such verdict and have a nonsuit entered on the grounds:—(1) That the plaint was wrongly entered, and should be brought against the attorney and not the client in the cause. (2.) That the evidence showed the action to be unnecessary; and (3) That the action was premature.

Smith, for the defendant.—The special case is based on the 55th section of the Local Courts Act. There are several authorities for the first point—

Chitty on Contracts (7th Ed.), 526
Brewer and Jones, 10 Exchequer, 655,

and other cases there cited. At the present moment, however, no one can be sued. The Local Courts Act, Section 202, says the costs are to abide the event unless the rules of practice are to the contrary, or that the Court make a particular direction on the subject; and the next clause, No. 203, states that the fees of the bailiff, contained in Schedule I of the Act, shall be paid by the party interested, except in cases of interpleader and those fees that may be incurred from keeping in possession or from sale of goods seized. The event has not yet arrived, and the items in question are those excepted by the Schedule, so that at the present moment I contend that he could sue no one. It has never been contended that the bailiff could sue the plaintiff if engaged by the attorney. (STOW, J.—But the bailiff of the Local Court is in the same position as would be the sheriff in England. Could not the sheriff sue the plaintiff?) I contend he could not. The employment of the bailiff is a matter of engagement, and when there is an attorney to the cause, the engagement is always made by the attorney. (STOW, J.—The cases you quote are those in which the bailiff was entitled to sue under some special retainer.) At one time it was held that the sheriff could not sue under any circumstance. Perhaps, the bailiff might have been able to sue the plaintiff for the fees that must be paid beforehand, but even that is doubtful—

Brewer v. *Jones* (ante)
Maile v. *Mann*, 2 Ex., 608.

Besides, under the Local Courts Act you need not go to the bailiff of the Court, and by an application to the Special Magistrate you can obtain the appointment of your own bailiff. The matter is simply one of retainer. It is contended that the bailiff was the servant of my client and acted at his request. But that is altogether opposed to the evidence. The evidence shows that my client was the servant of the bailiff, and that the latter disregarded all the requests and suggestions of my client. How then he can support this action I fail to see.

Mann, Q.C., for the plaintiff.—The bailiff of the Local Court is in

precisely the same position as are the sheriffs in England. The 9th sub-division of the 20th section of the Local Courts Act makes the bailiff responsible in like manner as is the sheriff of the Province; and the 4th sub-division of the same section casts on him the duty equivalent to those belonging to the sheriff, for he shall execute all warrants placed in his hands within a given number of days. All the cases quoted are beside the question, as they refer to engagements entered into with the bailiff or the sheriff.. There is an express authority affirming that the client can be sued by the sheriff—

Maybery v. *Mansfield*, 16 L.J., Q.B., 102.

If it were not so, in many cases the sheriff would find great difficulties in getting his fees. There is another case—

Maile v. *Mann* (ante),

which *Mr. Smith* thought overruled the case I have just quoted, but I think on examination it will be found that the cases confirm one another. I think it a fair inference that the party who paid the fees, which must be settled beforehand, would have to pay the contingent fees. (GWYNNE, J.—In England the sheriff's officer is in immediate connection with the Court as an officer. Is that so here as regards the bailiffs?) Yes; just the same. It must be recollected that the plaintiff did not get a verdict for the full amount that he claimed, and that the disputed amounts may be said not to be in the verdict. (STOW, J.—Would it not be a question, as regards the contingent fees, whether the bailiff would not have to protect himself for those against the goods he had seized?) No doubt, but the question is not raised by the case.

Smith, in reply.—The evidence shows the course of business I was in the habit of pursuing in the Northern Territory, and the bailiff, therefore, could have no doubt as to by whom he had been retained. The bailiff here is not in the same position as the sheriff at home; you can have your own bailiff. (HANSON, C.J.—Only by permission of the Special Magistrate, and even then he is the bailiff of the Court.) If that is the view taken by the Court, then I contend that as these fees abide the event, and as all proceedings

have been stayed, the event on which the fees depend has not arrived. (GWYNNE, J.—But the proceedings were not stayed by the workman who would want his wages.)

Cur. ad. vult.

1 September—

Judgment herein was now delivered as follows:—

HANSON, C.J.—This is in substance an action for money paid by the plaintiff for the use of the defendant at his request, and the finding of the Court below establishes the fact that the money was paid by the plaintiff at the request of the defendant. It is, however, contended on the part of the defendant that the action should have been brought against his attorney and not against himself, and that it has been brought prematurely. The facts of the case are that the defendant had recovered a judgment in the Local Court of Palmerston, under which a warrant was issued against the goods of La Tour, and that this warrant was delivered to the plaintiff, who was the bailiff of that Court, for execution. It would appear that the only goods of La Tour capable of being seized under that warrant were some horses, at the time at a distance from Palmerston, and the plaintiff by the direction of the defendant employed a horse and cart and two men to assist him in seizing and bringing in these horses, and afterwards by the same direction put them in (apparently) livery stables at Palmerston. The defendant, indeed, denied that he had given these directions, but the finding of the Court is for the present purpose conclusive upon that point. Afterwards notice of appeal was given in the action against La Tour, and a bond entered into to prosecute such appeal, in consequence of which the horses were given up, and the plaintiff then sued the defendant for the money paid by him for the hire of the horse and cart, and for the wages of the men employed, and for stabling and the keep of the horses. Upon the trial a nonsuit was asked for on the grounds that the plaintiff was not liable, but only his attorney; that the payments were not necessary; and that this action could not be brought until the appeal in the original action was decided. The nonsuit was refused, and the plaintiff

had a verdict for the moneys actually paid by him, but the Court reserved the points for the consideration of this Court. In support of the first point, we were referred to the cases *Maile* v. *Mann* and *Brewer* v. *Jones*, which show that the bailiff of a sheriff cannot bring his action against the party for whose benefit execution issues, but must sue the attorney; and it was argued that the present bailiff, being a bailiff, came within the principle of those cases. But the bailiffs in the cases referred to were persons whose duties and right arose not by virtue of office, but by reason of special employment in each particular case, and that employment was supposed to be, as in fact is almost always the case, the act of the attorney. But when the duty in respect of which the claim is made is the legal consequence of the office, as in the case of the sheriff, then the party and not his attorney is liable—*Maybery* v. *Mansfield*. In the present case, the duty of the plaintiff results from his office as bailiff and not from any special employment, and consequently the defendant, as the party at whose instance the warrant issued, is the proper person to be sued. And with regard to the objection that the action was brought prematurely, the evidence showed that in fact the plaintiff was *functus officio* in respect of the warrant, and had no further duties to perform under it. There was consequently nothing to wait for.

GWYNNE, J.—I agree in that opinion; but even if that were not sufficiently based upon the law, which my learned colleague the Chief Justice has laid down, there was sufficient matter of evidence to justify the Magistrate in drawing the inference that there was a special engagement between the plaintiff in the case of *Colgan* v. *De La Tour* and the bailiff. Although there is the evidence of *Mr. Villeneuve Smith* in the contrary direction, it was competent for the Court below to take what opinion it liked of the facts, and the inference which could be drawn from those facts was in my opinion sufficient to ground the action.

STOW, J.—I concur.

Appeal dismissed.

HANSON, C.J., GWYNNE, J.] [COMMON LAW.

18 MAY, 1875.

HUNTER v. PLAYER.

REAL PROPERTY ACT, 1861.—*Tenant in possession—Trespasser—Agreement—Payment of Rent.*

A tenant in possession under an agreement with a person who subsequently obtains a clean certificate of the land in respect of which such agreement is made becomes a trespasser as against such person, until a fresh tenancy is created by possession and payment of rent.

RULE *nisi* calling upon the defendant to show cause why the verdict should not be increased, and damages as assessed by the jury at the trial awarded on the ground, amongst other things, of misdirection on the part of the presiding Judge in directing the jury that the right of possession was at the time when the cause of action arose in the defendant.

The action was assault.

The facts, so far as material to this report, were—

That an agreement was entered into between plaintiff and defendant, whereby the defendant agreed to let to the plaintiff certain land.

Subsequently, the plaintiff having obtained a clean certificate of title under the provisions of the Real Property Act, 1861, of the same land, and having, during the temporary absence of the plaintiff, obtained possession thereof, forcibly prevented the plaintiff from resuming possession. There was no payment of rent by the plaintiff to the defendant after the clean certificate was obtained.

Wigley, in support of the rule.—I abandon the portion of the rule which asks to have the verdict increased. I shall confine myself to the right of possession.

GWYNNE, J.—The certificate destroyed any antecedent contract.

HANSON, C.J.—My opinion has been that a tenancy might be created, not by a writing, but by the payment of rent and possession. But in this case there was no payment of rent after the title was obtained.

GWYNNE, J.—Suppose the defendant had brought an action of ejectment, and at the trial produced the certificate, would not the Judge be bound to tell the jury that they must find a verdict for the plaintiff? The Act says that the production of certificate shall be conclusive evidence of title, and nothing can be received in contradiction of it. If you have the right of possession you need not bring any action at all. You can, to use the term employed by the Germans, adopt "self-help." It is safer, however, to bring an action.

Wigley.—I would respectfully point out that, in this case, there was a previous agreement between the parties. Surely that ought to stand?

HANSON, C.J.—The only question is as to the effect of the certificate of title. The agreement was prior to the certificate.

Wigley.—There was an agreement for the letting of the place, and the plaintiff held possession as the defendant's tenant. The latter could only obtain possession by an action for ejectment.

HANSON, C.J.—Where is your authority for that?

GWYNNE, J.—It is quite contrary to the law. Nothing stands against the certificate of title.

Wigley.—Surely not with the tenant in possession?

GWYNNE, J.—Yes.

HANSON, C.J.—Mr. Justice MAULE has laid it down most distinctly that when two persons are in a house, and both exercise rights of ownership, the person having possession of the title is considered to be the owner, and the other one a trespasser. The moment the certificate of title was obtained, the plaintiff's term, as a tenant, came to an end, and he was a trespasser.

Wigley.—What, after he has paid his rent?

GWYNNE, J.—That is the immorality of the Real Property Act. It is the law, however, and it must be administered. The certificate acts like a wet sponge, and wipes the slate clean.

HANSON, C.J.—I should be with you, *Mr. Wigley*, if the case was as you put it, but there is no evidence that it is so. There is only one construction to be put on the Act, and that is that the obtainment of the certificate destroys all prior interest.

Wigley.—Then the doctrine of estoppel comes in. A person cannot dispute his own title.

HANSON, C.J.—It would have been a very wise thing if the Act had contained such a provision, or had been silent as regards the certificate of title. When an Act says that a clean certificate shall cause all other interests to cease and determine, we are bound to hold that such shall be the case.

GWYNNE, J.—What would the advocates of the new system say if we decided that a person would be estopped from taking proceedings because of something existing before the clean certificate was taken out?

Wigley.—Then no one is safe to go home. Besides, a landlord is bound to put his tenant in a proper position.

HANSON, C.J.—Then you must file a bill. Your doctrine of estoppel would destroy the Act.

J. W. Downer, for the defendant, was not called upon.

Rule discharged.

GWYNNE, PRIMARY JUDGE.] [EQUITY.

24 AUGUST AND 14 SEPTEMBER.

FORREST v. FORREST.

WILL.—Construction—Effects.

A testator by his will, after devising a section of land to each of two sons and bequeathing a sum of money to a third son, then continued:—"And to Susannah, my beloved wife, I give the residue of all my goods, cattle, chattels, and other effects, and I appoint her my sole executrix."

Held—*That the residuary really did not pass under the above residuary bequest.*

SPECIAL case. William Pinkerton by his will (being at the time of the making thereof and also at the time of his death possessed of real and personal estate), after devising a section of land to each of two sons and a sum of money to a third, gave to "Susannah, my beloved wife, the residue of all my goods, cattle, chattels, and other effects for her own individual use."

The question submitted was whether the bequest to the wife affected the residuary real estate.

The *Attorney-General (Way, Q.C.)*, for the plaintiff.—*Prima facie* the words "other effects," apart from the meaning of the other provisions of the will, would not include land. But I think I can satisfy the Court that such was the intention of the testator, and that therefore the widow is entitled to the residuary real estate. The present Master of the Rolls, SIR GEORGE JESSEL, states that, as the meaning of the testator is contained within the written deed, the will must be construed upon the words in the writing and by those surrounding circumstances which may happen to be presented to the Court—

Waring v. *Currey*, 22 W.R., 150.

Lord MANSFIELD said on one occasion that no word in the

English language was so strong that it would not bend to the meaning a person might put upon it, though such might be different to the ordinary acceptation of the word—

Doe d. Andrew v. *Lainchbury*, 11 East., 290;

and your Honor took the same view in a recent case. Lord Justice KNIGHT BRUCE has said that it is the constitutional right of a person to be eccentric in the use he makes of the English language in a will. I shall contend that in the word "effects" the testator meant to include land. When a person makes a will it is *prima facie* a presumption against intestacy. Also, when a person makes a special devise to his heir there is in law a presumption that he means his heir to inherit. (GWYNNE, J.—It is an act of supererogation.) I am glad to hear your Honor say that. It coincides with the opinion of Vice-Chancellor WOOD now Lord HATHERLEY, to which I am about to call attention—

Wright v. *Shelton*, 18 Jur., 445.

In that case he said the words in the will "worldly goods" passed all lands not specifically devised. The case I have just referred to is, I venture to think, on all fours with the present, "goods." The word in that case is, I contend, synonymous with "effects" in this case, and the word "goods" was held to mean "everything from which a man may benefit." If the other side's contention be correct, the heir-at-law will be in the same position as the other children, and the testator having died intestate each will have his share of the realty. (GWYNNE, J.—Has probate been taken out?) Yes; without that we could prove nothing. (GWYNNE, J.—The difficulty is not so much to prove things as to keep on the right road. Is there any exception of lands in the probate?) No. (GWYNNE, J.—Then the testator died intestate. It is my duty to administer the law as I find it, whatever may be my opinion of its merits; and I find that by the Intestate Estates Act, No. 29 of 1867, sec. 2, that unless the probate excepts land the deceased is considered to have died

intestate. I am thus told it is not a question of evidence nor of legal construction, but—at least I read it so—that unless in the probate some land is excepted, I must take that as conclusive evidence that the party died intestate.) But my contention is that the probate does make the exception. The probate incorporates the will. (GWYNNE, J.—But it must be done in the probate itself.) Then I shall have to ask your Honor to amend the probate. On a consideration of the will itself, I would point out that this illiterate testator used in talking of his personalty words applicable to real property; that he makes provision for all his family then living, thus negativing the presumption of intestacy; that the word "residue" has reference to gifts which technically are realty; that the word "effects" means "property," or, as Lord LANGDALE has put it, "all that I may succeed in bringing together;" and that to exclude lands would denude "residue," and "other effects" of all meaning—

1 Jarman on Wills, 3rd Ed., 681
Tilley v. *Simpson*, 2 T.R., 659
Hogan v. *Jackson*, Cowper, 299
Lord Torrington v. *Bowman*, 22 L.J., Chan., 236
Doe d. Tofield v. *Tofield*, 11 East., 246
Doe d. Wall v. *Langlands*, 14 East., 370
Doe d. Morgan v. *Morgan*, 6 B. & Cr., 512
Doe d. Evans v. *Evans*, 9 Ad. & Ell., 720
O'Toole v. *Browne*, 3 Ell. & Bl., 572
Hopewell v. *Ackland*, 1 Com., 164
Huxtep v. *Brooman*, 1 B.C.C., 437
Evans v. *Crosbie*, 15 Sim., 600
Wildes v. *Davies*, 1 Sm. & Gif., 475
Doe d. Chilcott v. *White*, 1 East, 33
Marquis of Titchfield v. *Horncastle*, 2 Jur., 610.

Bakewell, for the defendant.—The words of the will affect the personal estate, and cannot by any force of construction be made applicable to the real estate. If in the last clause in the devise to his wife the testator had stopped at the word "residue," he would

have passed both his personal and real property; but he has gone on to define what "residue" shall mean, and the case is therefore narrowed down to a question of the meaning of the word "effects." If the word "effects" were not there, there would have been no argument for the other side. I think there are many cases to prove the proposition that the word "effects" does not pass real property—

Doe d. Hick v. *Dring*, 2 M. & Sel., 448,

in which are referred to—

Hogan v. *Jackson*, Cowp., 299
Doe d. Andrew v. *Lainchbury*, 11 East, 290
Doe d. Chilcott v. *White*, 1 East, 33
Camfield v. *Gilbert*, 3 East, 516.

It would be perfectly competent for a man to commence a will as the Legislature does an Act by an interpretation clause. In the cases cited by the learned *Attorney-General* the decisions have been where it was clear the words must refer to real property, and in the case of the *Marquis of Titchfield* v. *Horncastle* the case was decided on a totally different point altogether. (GWYNNE, J.—In this case was there a special devise?) But that was property of a totally different character, and cannot be said to be included in the residuary clause. (GWYNNE J.—Then he intended to die intestate as regards the town acre.) That is entirely a speculative argument. It cannot be said what he might have intended to do with it. The same argument would apply in every case that has been tried, for unless there was other property there would never be litigation. The argument cannot have much force. In the first three clauses the testator uses the words "I give and bequeath." (GWYNNE, J.—The word "bequeath" is surplusage.) Perhaps so; but it is important, for when we come to the last clause we find only the word "give" employed, thus showing that the testator had in his mind that there was a clear distinction between the classes of property he was conveying. I deny the

statement of the learned *Attorney-General* that the testator was an illiterate man. The will does not show that he was. It is perfectly clear, coherent, and intelligible. He first deals with his real property, piece by piece, then with a portion of his personal estate, and finally he deals with the residue. Can it be said there was any confusion in the testator's mind as regards what he was doing? There are several cases to show that words more comprehensive than those in this will have been held not to pass real estate.—

Woolam v. *Kenworthy*, 9 Ves., 137
Timewell v. *Perkins*, 2 Atkins, 102
Belaney v. *Belaney*, 36 L.J., Chan., 265
Cook v. *Jaggard*, 35 L.J., Ex., 76
Coard v. *Holderness*, 20 Beavan, 147.

There is another point to be considered, though it has been treated with contempt by the learned *Attorney-General*—the appointment of an executrix, which I think is a strong argument in favour of my contention—

Shaw v. *Bull*, 2 Eq. Ca. Ab., 320.

The case goes a good deal further than I could wish, and I must confess that in many parts it has been overruled; but I think, so far as I want it to go, it has been upheld. At first sight there is a distinction between this case and that of *Wright* v. *Shelton*, quoted on the other side; but on examination it would seem that they are very similar. Apart altogether from the technical construction of the will, there are considerations suggested by the facts which ought to have great weight with a Court of Equity. Assuming for sake of argument that the contention on the other side to be correct, not merely the eldest son, but all the other children of the testator will be disinherited, and the widow come in for all the property, and I therefore ask your Honor to declare that the testator died intestate as to all the real property not specifically mentioned in the will. As regards the costs. there

being no estate in Court, your Honor will have to make a special order in the matter.

Cur. ad. vult.

14 September—

GWYNNE, P.J., now gave judgment:—

This is a special case stated for my opinion, and the question raised is, in what sense did the testator use the word "effects?" The testator having, both at the time of making his will and at his death, real and personal estate, gave to his eldest son, and also to his second son, a section of land; and to his third son a sum of money not exceeding £100, to be invested in a section of land for him and his heirs for ever. The will then goes on thus:—"And to Susannah, my beloved and lawful wife, I give the residue of all my goods, cattle, chattels, and other effects, for her own individual use, and I appoint her my sole executrix." The only question on this case is whether by the words "and other effects" the real estate—other than that devised to his sons—of which the testator died seised passed. Now, the word effects *ex vi termini* applies to personal estate, and it cannot be disputed alone, and *proprio vigore* it does not include real estate, and the question is whether its ordinary and established signification be enlarged by any other words in the will, or whether from the whole context of the will or from any particular clause in it an intention in the testator to use it in a more enlarged sense can be made to appear. In my opinion, the word "effects" stands in the will unaided by any context, and the will affords no index of the testator's mind to show that he used it otherwise than in its ordinary and appropriate sense. Putting aside the word "cattle" as of no use or force, we have the three words "goods, chattels, and other effects," and it cannot be disputed that each of these three words has an equally extensive import; and it is equally clear that by each of those words used singly a man could pass the whole of his personal estate; and I know of no rule of construction by which the use of three words of the same or equal import in combination will give to any one of them a more enlarged signification than what it would receive when used singly.

Case answered in favour of defendant, with costs.

GWYNNE, PRIMARY JUDGE.] [EQUITY.

7 SEPTEMBER AND 5 OCTOBER, 1875.

ST. GEORGE v. BURNET AND ANOTHER.

EQUITY ACT, 1866-7.—*Revivor—Order—Service.*

Under Section 46 of the Equity Act, 1866-7, *where a suit is abated by reason of the insolvency or death of one of the defendants, a common order to revive the suit may be obtained, and such order or any notice thereof need not be served on the other defendants to such suit.*

MOTION to set aside an order of revivor, on the grounds that the Court had no power to make such order, and that notice of the same was not served on the surviving defendant.

On the 11th October, 1869, a decree was made directing an account. On the 11th November, 1870, after the Master had finished the enquiry, but before he had presented his report to the Court, the suit became partially defective by the insolvency of the defendant Burnet, and on the 22nd of the same month totally so from the failure of the plaintiff to join the official and trade assignees of such defendant as parties to the cause. Though the suit was in this defective state, the Master made a report to the Court that the defendants appeared during the enquiry by counsel, and that the result of his labours was that the defendants had become possessed of a sum of £813 4s. 1d. belonging to the estate. On August 28, 1871, the Master's certificate, on the application of the defendant James Day, was amended by the Full Court, who reduced the amount found to be due from the defendants to the estate to £513 4s. 1d. The cause was at the same time set down for further consideration. On April 4, 1872, the defendant Burnet died, and an order was made to amend the suit by substituting in his place his widow and executrix, Elizabeth Burnet. The estate of deceased had paid a dividend of 5s. $3\frac{11}{20}$d., and this, together with the expenses incurred in the Insolvency Court, had swallowed up all the proceeds. In September, 1874,

an order was obtained to stay all further proceedings until the defects in the cause had been remedied, and to meet that event the plaintiff had obtained, under the 46th section of the Equity Act, "a common order," and had served notice of the same on the assignees of the insolvent and deceased trustee Burnet. The surviving trustee contended that he ought to have had a similar notice, and that by taking the step the plaintiff had there had been a failure of obedience to the command of the Court.

The *Attorney-General (Way, Q.C.)*, for the defendant Day.—The question is whether a "common order" can be made? I think I can satisfy your Honor that it could not, for the simple and manifest reason that since the suit became defective proceedings have been taken, at which the parties now sought to be joined ought to have been represented. By the order sought, the assignees would be put in the position that they would have occupied if they had been joined as parties to the suit immediately it became defective; but that would be a denial of justice to them, for if they were parties to the cause then they would have had the right to have been heard at every stage of its procedure—

Auster v. *Haines*, L.R., 4 Chan., 445
Capps v. *Capps*, L.R., 4 Ch., 1
Egremont v. *Thompson*, L.R., 4 Ch., 448
Griffin v. *Morgan*, 19 L. T., N.S., 714.

It is clear, then, that without the consent of the parties this order cannot be made. If the consent be not given, then defects in a suit can only be remedied by a supplemental bill—

Hildyard v. *Field*, 25 L.T., N.S., 784
Patch v. *Holland*, 29 L.T., N.S., 419
Scott v. *Duncombe*, L.R., 9 Eq., 665
Pemberton's Equity Practice, 31, 52, 53
Dyson v. *Morris*, 1 Hare, 413
Jones v. *Howell*, 2 Hare, 350
Beale v. *Smith*, L.R., 9 Chan., 85.

Stuart, on the same side.—Under no circumstances is the plaintiff entitled to the order, and even if he were, then he has not taken the proper procedure to enable him to act upon it, as he has failed to give us notice. It is entirely by the *laches* of the plaintiff that the fund which would have been otherwise available has been paid away by the assignees. The question as contribution by the co-defendant can be considered on the further consideration—

Bate v. *Hooper*, 5 De Gex, McN. & G., 338.

The order is a nullity.

Barlow, and *Wigley*, for the plaintiff.—That is a point not taken by the motion. The motion only speaks of irregularity.

Stuart.—The Court will not refuse to hear any argument which may show that there has been an excess of jurisdiction which ought to be rectified.

Barlow and *Wigley*.—By abandoning the motion to dismiss the order replacing the deceased trustee by his widow, the other side admits the suit to be constituted aright up to that date. The present motion is simply an attempt to go behind an order admitted to be correct. This is a dilatory motion by the defendant for the purpose of obtaining time in which to pay the amount he owed. If the defendant wished to make out a case he must do so in his answer. The present conduct of the defendant amounts to an admission that when he obtained the order reducing the amount the Master said he owed the estate, he made false pretences to the Court, perpetrated a farce, and so inveigled the Court into giving him what he had no right to ask. It would be useless to say that he did not know that the other defendant, his brother-in-law, and a man with whom he was in constant communication, had become insolvent. (GWYNNE, J.—Unfortunately, the English rule that a *Gazette* notice is publication to all the world does not prevail in South Australia.) Then we submit that the present defendant has no *locus standi* on this stage of the cause, for the Act distinctly

says that the person competent to ask for the dismissal of such an order as the one prayed is he who has received service of notice, and the defendant, by his affidavit, expressly admits that he has not had notice. At a future stage he may contest the matter, but at the present time he has no *locus standi*. (GWYNNE, J.—The argument will go a little too far. By this means you could avoid making a person who had a great interest in the question a party to the cause.) But he would have the remedy I have already indicated. If he liked he could himself file a supplemental bill. Even if he had the right under the Act to do so, he could not now appeal against the order, as he allowed the twelve days to elapse, the time specified by the rule of Court in which to make appeals. The *Attorney-General* has by his argument pretended that he represents the assignees. Those parties have not quarrelled with the course adopted by the plaintiff. None of the cases cited touch the question at issue. They all refer to instances in which new interests have come into existence never previously presented in the suit. Here, however, there is no creation of interest, but a mere transmission from a trustee to his assignees, and they take his place. And if there has been no acquiescence nor laying by on the part of the defendant, the defective state of the suit has been caused by a common error of which the defendant is precluded from taking advantage—

Phillips v. *Clarke*, 7 Sim., 231
Hunter v. *Capron*, 7 Jur., 185.

(GWYNNE, J.—The suit is at an end, there having been a decree.) He cannot raise any equities not raised by the original bill—

Morrison v. *Morrison*, 4 M. & C., 216.

(GWYNNE, J.—I can only listen to the other side's argument on the ground of nullity.) And that argument, by the terms of the motion, they are precluded from bringing before the Court—

Pemberton's Equity Practice, 26
Steele v. *Plomer*, 2 Phil., 782.

The defendant is precluded by the common error of the parties from taking his present objection—

Davis v. *Franklin*, 2 Beav., 369
Lincoln v. *Wright*, 4 Beav., 166
Lash v. *Miller*, 4 De Gex, McN. & G., 841
Cochrane v. *Phillips*, 3 W.R., 461.

It is not necessary to serve a notice upon a person who is already a party to the suit; the assignees are the only persons entitled to be served, and they have had notice. That was the practice under the old state of things, and in the cases commenced before the change must govern the present practice—

Pemberton's Equity Practice, 56, 86.

The cases of

Dyson v. *Morris*, 1 Hare, 413,

and

Jones v. *Howell*, 2 Hare, 350,

can not apply, as in those cases the suit had been defective from the first for want of parties, and a supplemental bill was necessary to enable parties to be represented. In

Patch v. *Holland*, 29 L.T., N.S., 419,

there was an acquiescence on the part of the parties; and in

Griffin v. *Morgan*, 19 L.T., N.S., 714,

there had been a change of *status* of one of the parties, neither of which events has occurred in the present case, and it cannot therefore be governed by the decisions given therein. The plaintiff has nothing more to do than to ask for his own rights,

and he need not endeavour to settle any differences that may exist between co-defendants—

Lewin on Trusts, 4th Ed., 639
Eccleston v. *Lord Skelmersdale*, 1 Beav., 396
Seton on Decrees, 3rd Ed., 22, 23
Jolly v. *Arbuthnot*, 28 L.J., Chan., 274, affirmed *ibid.*, 547
Pitt v. *Bonner*, 5 Sim., 577
Lewin, 640
Perry v. *Knott*, 4 Beav., 179
Collingham v. *E. O. Shrewsbury*, 3 Hare, 650
Bignell v. *Atkins*, 6 Mad., 369.

Stuart, in reply.—The argument of the other side has proceeded upon the fallacious assumption that there has been a breach of trust. It may have been that the defendant was over confiding, and trusted too much in his co-trustee; but it is idle to suppose that he would have done as the other side said he ought to have done, and committed himself to an expression of opinion that a thing had happened when he did not believe it had occurred. Surely the plaintiff cannot complain of irregularity on the part of the defendant when he has been guilty of the same thing. All the recent cases show that the order prayed is beyond the jurisdiction of the Court, and the difficulty is now met by a summons being issued to all the parties in the cause calling upon them to show why the order should not stand. *Mr. Barlow* has said the Court cannot consider the respective rights of co-defendants, but that is opposed to a good authority. And it must be strongly borne in mind that this is not a final decree; and that a decree which simply directs the Master to take accounts is open to further consideration—

Daniels, 753.

Cur. ad. vult.

5 October—

GWYNNE, P.J., now delivered judgment as follows:—

This was a motion on the part of the *Attorney-General* to show cause why an order of revivor obtained by the plaintiffs should not be set aside with costs as being irregular, or rather a nullity, and therefore void. I find that this is a suit commenced many years ago. The bill was filed on the 16th December, 1868, and it called upon the trustees to give an account of the administration of the trust, and it has lingered on till the present day. What the causes of delay have been, I do not know; but one cause apparently is that one of the trustees became insolvent, and subsequently died. The suit from that fact became defective, and it was necessary for the plaintiff, if he intended to carry on the suit, to make it right by putting before the Court the representative of Burnet, and this motion turned upon the question of making his assignees parties to the suit. It is not necessary to consider whether his executrix ought to have been made a party, for from the date of his insolvency the suit was defective. It was, therefore, necessary that his assignees should be brought before the Court and made parties to the suit. Under the old law, it would have been necessary to file a bill for that purpose, but it seems that the spirit of the age is against such a procedure. I am very glad that it is so, for looking at the mass of papers before me from which no benefit has accrued, it would be simply a mockery of justice to be obliged to cause the plaintiffs to file a bill in order to make the assignees parties to this suit. I deem it fortunate that the spirit of the age is against such vast, such useless, and such an unreasonable process as the old law sanctioned. The English Legislature, however, changed the law, and that change has, I am happy to say, been adopted in South Australia in the Equity Act of 1866; and the question at issue turns upon the construction to be put upon Sections 45 and 46 of that Act—sections which have a totally different purpose, which were passed to remedy different evils, and therefore receive different constructions. By the 45th section it is enacted—"It shall not be necessary to exhibit any supplemental bill in the said

Court for the purpose only of stating or putting in issue facts or circumstances such as may have occurred after the institution of any suit; but such facts or circumstances may be introduced by way of amendment into the original bill of complaint in the suit of the case if otherwise in such a state as to allow of an amendment being made in the bill; and if not, the plaintiff shall be at liberty to state such facts or circumstances on the record in such manner, and with respect to the proof thereof, and the affording the defendant leave and opportunity of meeting the same, as shall in that behalf be provided by the rules and regulations before mentioned." Upon the construction that is put upon the section, it is clear that for many purposes it is still necessary to file a supplemental bill. It is clear that after a decree had been made, a suit could not be amended, and such an amendment could not come within the scope of the 45th section. But the other section, the 46th, is quite a different enactment. It says:—"Upon any suit in the said Court becoming abated by death, marriage, or otherwise, or defective by reason of some change or transmission of interest or liability, it shall not be necessary to exhibit any bill of revivor or supplemental bill in order to obtain the usual order to revive such suit, or the usual or necessary decree or order to carry on the proceedings; but an order to the effect of the usual order to revive, or of the usual supplemental decree, may be obtained as of course upon an allegation of the abatement of such suit of the same having become defective and of the change or transmission of interest or liability, and an order so obtained, when served upon the party or parties, who, according to the practice of the said High Court of Chancery, before the first day of November, one thousand eight hundred and fifty-two, would be defendant or defendants to a bill of revivor or supplemental bill, shall from the time of such service be binding on such party or parties in the same manner and in every respect as if such order had been regularly obtained according to the then existing practice of the said High Court of Chancery; and such party or parties to the suit shall be bound to enter an appearance thereto in the office of the said Supreme Court within such time and in like manner as if he or they had been duly served with process to appear to a bill of

revivor or supplemental bill filed against him: Provided that it shall be open to the party or parties so served, within such time after service as shall be in that behalf prescribed by the general rules and regulations aforesaid, to apply to the Court by motion or petition to discharge such order on any ground which would have been open to him on a bill of revivor or supplemental bill, stating the previous proceeding in the suit, and the alleged change or transmission of interest or liability, and praying the usual relief consequent: Provided also, that if any person so served shall be under any disability other than coverture, such order shall be of no force or effect, as against such person, until a guardian or guardians, *ad litem*, shall have been duly appointed for such person, and such time shall have elapsed thereafter as shall be prescribed by the rules and regulations before mentioned." That section meets the present case, where there has been a transmission of the privities of estate, and the defect in the suit can be rectified by a motion made in Court, *ex parte*, and without any affidavit. That was the course—the very proper course—adopted by *Mr. Barlow*, who, on behalf of the plaintiffs, obtained a common order of revivor. The *Attorney-General* and his learned junior seem to have mixed up the effects of these two clauses that I have quoted. It is true that the decisions on the sections in the English Act—Sections 52 and 53—which are analogous to our 45th and 46th sections, are very conflicting and contradictory; but it seems to me that all the later cases, such as *Joberns* v. *Couch*, Seton, 1166; *Sennett* v. *Radcliffe*, 16 W.R., 414; *Provincial Banking Corporation* v. *Tillett*, W.N. (1869), 222, bear out the view that I have taken. My view is, I may say, in accordance with the statement of the textbook (Daniels's Chancery Practice, vol. ii., 1377):—"Where, however, in consequence of the death of a plaintiff or defendant, a fresh and distinct interest has arisen in another person not a party to the suit, and there is no privity between such person and the party who is dead, there can be no order of revivor, but the person in whom the fresh interest has arisen must be brought before the Court by an original bill." It might be said that I should order the plaintiff to proceed with a bill; but I am loth to do that, the more especially as there must have been privity of interest between

the insolvent and his assignees, and I therefore think that the obtaining of the common order of revivor was the more correct course to have pursued. I must say that the cases presented by the *Attorney-General* were very much mixed up, and indeed the large majority of the cases were an interpretation of the 45th clause, which does not in my opinion apply to the present case. I feel bound to confess that that may be somewhat owing to the contrary decisions that have been given in England—contradictions which I believe arise owing to the great respect paid by lawyers to the reason of their ancestors, which never allows them to extend liberal notions one inch further than they feel conscientiously bound to do. I find that the defendants have entered an appearance, and have submitted to the jurisdiction of the Court. They have appeared before the Master; they have been instrumental in bringing about a certain arrangement, and in agreeing to the Master's report; and on that ground alone, I would not interfere to disturb this order. If there were not this fatal bar of acquiescence, it is clear that the defendants have not conformed to the rules of the Court, as it is quite clear they did not appeal within twelve days from the making of the order. The matter is, therefore, simply one of costs. I cannot help feeling that this motion was an improper one, and I feel a certain twinge of conscience in not making the solicitor pay the costs; but seeing that this matter has been in the Court since 1868, and at that time Equity jurisprudence was not so well understood nor so much practised as now, even by myself as well as the Bar, I feel I must act on the maxim—"Not being ignorant of evil, I pity the wretched who suffer." But though I will say that the solicitor should not pay the costs, still his client should do so, and I, therefore, dismiss the motion, with costs against the surviving trustee, Mr. James Day.

Motion dismissed

HANSON, C.J., GWYNNE, J.] [COMMON LAW.

29 AND 30 JULY, 4 AUGUST, AND 7 OCTOBER, 1875.

LEVINE v. THE BANK OF ADELAIDE.

COMPANIES ACT, 1864.—*Cheques or Orders—Bills of Exchange—Notice of Dishonour.*

The plaintiff, a storekeeper, was in the habit of receiving from miners in his neighbourhood, in payment for goods, certain documents, signed by the captain and purser of the mine and addressed to the Secretary, and of sending these to his bankers, who at first treated them as cash, but subsequently gave notice to the plaintiff that they would no longer receive them as cash, but only for collection.

One batch of these documents was dishonoured, but no notice of dishonour was given by the Bank to the plaintiff, and it was not until after a second batch of such documents had been received by the plaintiff and forwarded to the Bank, and not until the mine stopped payment, that the plaintiff learnt from the defendants that the first batch of documents had been dishonoured.

On the trial the above documents were treated by counsel and in the direction of the Chief Justice as cheques or orders for payment of money on which the Company was liable, and the verdict of the Jury was founded on that direction.

Held on appeal—*That the documents were bills of exchange, on which—they not having been drawn for and on behalf of the Company, nor accepted by the Secretary—the Company was not liable, and that as this view altered the conditions on which the liability of the defendants depended, there must be a new trial.*

Quære—*Whether the Company would have been liable if the bills had been accepted by the Secretary?*

RULE *nisi* obtained by the defendant calling upon the plaintiff to show cause why the verdict should not be set aside and a new trial granted on the grounds (1), of misdirection; (2), that the damages were excessive; and (3), that the plaintiff was only entitled to nominal damages, if any. And cross rule by the defendant for a new trial or to increase the damages.

The action was tried before the Chief Justice at the Civil Sittings of the first term of the present year.

The plaintiff, a storekeeper, was in the habit of receiving from miners and others engaged on the Prince Alfred Mine certain orders signed by the captain and purser of the mine and addressed to the Secretary and of forwarding these orders to the Bank of Adelaide, who at first treated them as cash, but subsequently gave notice to the plaintiff that in future they would not treat them as cash, but hold them simply for collection.

The mine stopped payment in May, 1874.

Two batches of the above documents sent by the plaintiff to the Bank were dishonoured, but no notice of dishonour was given to the plaintiff by the defendant.

The plaintiff claimed the amount of the two batches of orders, and also damages for the loss to his business and credit through the loss consequent on the non-payment of the orders. Counsel on both sides, at the trial, treated the documents as cheques or orders for payment of money on which the Company was liable, and the Chief Justice directed the jury accordingly; but also directed that the claim for loss of business and credit was too remote.

The jury gave a verdict for the amount of both batches of orders.

Boucaut, Q.C., and *J. W. Downer* now moved that the rule be made absolute.

The *Attorney-General (Way, Q.C.)* showed cause.—The argument on the other side proceeds, I believe, on the assumption that these documents are not bills of exchange, but orders drawn by a party upon himself. This certainly was a point not taken at the trial, and one therefore which if tenable the defendant would not be allowed to avail himself of at the present stage of the case; for if at the trial we had been driven to rely upon the contract between the parties the plaintiff's evidence might have been made

much stronger than it was. And for a moment let us see what is the worth of the objection. It is objected that these documents cannot be bills of exchange because there is not a drawer and a payee, and that a person cannot draw upon himself. If such were the case a London firm could not draw upon a colonial house if it was a firm of the same name and person. No authority has been quoted in support of the proposition. (GWYNNE, J.—Mr. Byles says a man can draw a bill upon himself.) It is a common mercantile transaction. That they are bills of exchange is clear, as they are drawn by the captain and purser of the mine upon the Secretary of the Company. It is not competent for the purser and captain of the mine to relieve themselves from liability as the drawers by showing that they drew as agents, though evidence might be given to show that other persons were also liable—

Byles on Bills, 71, 73
Penrise v. *Martyn*, 28 L.J., Q.B., 28
Lindsay v. *Walker and Another*, 4 S.A.L.R., 106

It is a custom of merchants, and therefore the law, that a banker who undertakes to perform the business of a banker must in the performance of his duty present bills sent him for collection and at once give notice of dishonour if they be not paid—

Byles on Bills, 282
Firth v. *Thrush*, 8 B. & C., 387
Van Wart v. *Woolley*, 3 B. & C., 439
Richford v. *Ridge*, 2 Campbell, 537
Hare v. *Henty*, 30 L.J., C.P., 302.

The receipt sent by the Bank that these orders were held for collection can only mean that the Bank undertook the duty of collection. It is urged on the other side that there was a corresponding duty upon the part of the employer to see whether the Bank did its work and that the orders were paid. (GWYNNE, J.—It would be a very natural impulse.) Under the circumstances of the cas-

it would not. The Bank had refused the plaintiff an overdraft, and that being so the fact that the cheques or drafts he drew against these orders were honoured was the strongest possible intimation that could be given by the Bank that these orders were paid. Supposing that these documents were not bills of exchange, then what would be the relation of the parties? The position of the Bank would be this—"I undertake to see whether they can be paid." If they were not paid, the duty of the person who undertook the responsibility of seeing whether they were paid would be to give notice of dishonour. It is also clear that when a banker or a person who undertakes the collection of bills fails to give notice of their dishonour within the ordinary and proper time for so doing by the law of bankers, he is assumed to have made the bill his own. Then the next question is—Did the plaintiff sustain more than nominal damages, and if so, whether the damages awarded are excessive? Assuming that I am correct in my first argument, that the Bank in failing to give notice of dishonour committed a breach of duty, the Bank will endeavour to relieve itself in two ways. In the first place they will say the plaintiff had his remedy over against his customers. Of course, if these orders were taken in exchange for goods, or in satisfaction of past due debts, then the right of the plaintiff as against transferees would be merely suspended—

Turner v. *Stone*, 1 Dowl. & L., 131.

But in many cases these orders were taken for actual cash, and Mr. Levine is entitled to be put in the same position as he would have been if the Bank had given proper notice of dishonour. Such cannot be said to be a case for nominal but for substantial damages. Then we shall in the second instance be met by the Bank saying, "You have your remedy over against the Company and the two drawers of the bill." It was shown in evidence the persons who had pressed the Company had obtained their money, and it was a fair question for the Jury to take into consideration. The probability of plaintiff's being able to have also obtained his money if he had the notice in due time, that would essentially be

a question for the jury to consider, and an estimate for them to make as to the amount of damage the plaintiff had suffered. And further there cannot be a verdict of nominal damages in this case, as the plaintiff could go to the jury on the money counts and recover the whole amount—

Van Wart v. *Woolley*, 3 B. & C., 439
Williams v. *Smith*, 4 B. & Ald., 496.

Ingleby, Q.C., on the same side.—The habit of a person drawing bills upon himself has become so common that it is known in the mercantile world as "pig upon bacon." As I think it must be quite clear that if the plaintiff is entitled to damages he is entitled to something more than nominal damages, the case is narrowed down to the question—Were the damages excessive? Now, the relation between principal and agent consists in an implied authority on the one hand and an implied confidence on the other—

Story on Agency, 5th Ed., 233, sec. 199.

The general principles of agency are, however, susceptible of qualification by the usage of trade or by the express permission of the principal—

Ibid., 243, sec. 208;

and the limitation of any particular agency is to be determined by the dealings and transactions that take place during its course—

Ibid, 244.
Van Wart v. *Woolley*, 3 B. & C., 439,

though at first sight appearing to support the view of the other side, will on perusal be found only to go this length—that the Judge said that if certain facts about which there were a doubt had gone to the jury, the verdict must have been for a different

amount of damages. The plaintiff having received no notice of dishonour would be entitled to presume that all the parties liable on the bill had paid it—

Philips v. *Astling*, 2 Taun., 206.

J. W. Downer, in support of the rule.—The argument that has been addressed to your Honors to-day from the other side is not only in the main different from that set out in the pleadings, but is entirely different from that taken at the trial. The declaration set out that these documents were cheques or orders for the payment of money. It was opened to the jury by the learned *Attorney-General* that the damage consisted in the plaintiff's loss of his remedy against the persons from whom he had received them, and it was on that basis that the learned Chief Justice directed the jury; and I submit that such being the case the *Attorney-General* has now no right to set up these documents as bills of exchange. (HANSON, C.J.—Of course when the rule is on the ground of misdirection parties are confined to the points that have been taken at the trial, but when the benefit that has been won is sought to be taken away a party can argue for its retainment from any aspect of the case that will best suit his purpose. And that is so for this reason—that the question is only what the damages shall be, and not how the damages occurred.) At the trial it was never suggested that this was a bill of exchange drawn by the captain and purser, on which therefore they were liable, and for a very good reason. If they had said at the trial that these were bills drawn by the captain and the purser on the Secretary, then we should only have had to have shown that the captain and purser had no funds in the hands of the Secretary to meet such drafts. In that is contained the whole theory of the notice of dishonour—that if you have funds notice is to be sent you at the earliest possible moment that you may withdraw them. These documents are to be looked upon as being the instruments that they are described to be in the declaration—viz., cheques or orders. Now, if they be cheques, the plaintiff would have lost no remedy by the failure to give notice, as the cheques being drawn by the captain

and the purser they would still be liable. And if they were promissory notes the result would be still the same, for no notice is required to be given to the maker of a promissory note of the fact of its dishonour. (HANSON, C.J.—Would it not be necessary to give notice within a reasonable time if a cheque were not paid, *Mr. Downer?)* I think not; but I am only dealing with the matter from the point of view whether these documents are bills of exchange. I must reiterate all I have hitherto said in objection to the right of the other side to now say they are bills of exchange; and I would further submit, as another reason why they are not entitled to do so, that the point never went to the jury. Assuming that these documents are cheques, the plaintiff, by the failure of the defendant to give notice, has lost no remedy he would otherwise have possessed against the drawers or endorsers. (HANSON, C.J.—But that you must see, *Mr. Downer*, must depend upon a great number of circumstances. What, I would ask, is the difference between an order for payment and a bill of exchange?) An order for payment may or may not be a bill of exchange. (HANSON, C.J.—Then, if that be so, can you narrow the question so as to say these documents were not bills of exchange?) A cheque is an inland bill of exchange. And now, assuming that these were bills of exchange, I shall still contend that by failure of notice the plaintiff has not suffered more than nominal damages. There is nothing in the evidence to show that the captain and purser did not have notice of the dishonour, and the remedy of the plaintiff would still therefore remain against them. The parties who passed these so-called bills of exchange to the plaintiff never endorsed them and never became parties to the contract, and so were not entitled to notice, and were never liable to the plaintiff. And then, even assuming that these were the bills of the Company, which, after the argument of the *Attorney-General*, it is impossible for the other side to say they were, the plaintiff's right against them would in no way be affected by the failure to give notice of dishonour, because they were in reality at the moment an insolvent company. *(Ingleby*—No; they were only suffering from impecuniosity.)

Cur. ad. vult.

30 July—

Boucaut (Q.C.), on the same side.—The first question to which I shall refer will be that of the alleged duty of the Bank to give the plaintiff notice of dishonour. (GWYNNE, J.—How do you found the duty?) On that of principal and agent, and the relation of the parties would have been governed by the custom of business as between Levine and the Bank. These documents were not bills of exchange in the ordinary mercantile sense. They were not treated or dealt with by Levine in that sense, neither were they renewed or treated by the Bank as bills of exchange. If the question had arisen while the Bank was receiving these orders as cash, I would not press my contention; but the position of the defendants changed after they wrote the letter saying that they would simply hold the orders for collection. That Levine appreciated the change was shown by his writing to ask whether the orders had been paid. There is sufficient evidence to show that all the course of business between the parties consisted in the orders being sent to the Bank for them to use their utmost efforts to obtain their collection, and the evidence as to what the Bank did warrants me in saying that instead of being negligent in the matter, they displayed great diligence. The ordinary incidents which flow from bills of exchange ought not to flow from orders like these given in far away country districts and sent to Adelaide for collection. This is the first time that these documents have been called bills of exchange. At the trial, they were only called orders for the purpose of obtaining money, and what was said by the plaintiff's counsel at the trial is wholly inconsistent with what has been set up on the argument. By the declaration, the plaintiff made out that the Bank had been negligent in not giving notice of the dishonour of bills, that under the plaintiff's present argument may be said not to have been accepted. It was charged that the Bank was guilty of negligence in not collecting the money from a person who was not a party to the bill. If it had gone forth publicly that these orders were bills of exchange, and it had been shown that they had been treated by other persons as such, then the Court would of course decide that they were bills. But it is perfectly clear that they were not treated as bills by the two men who issued them, nor by the men who

accepted them, nor by Levine himself. (GWYNNE, J.—But I apprehend that if by the writing the document was a bill of exchange, no treatment would make it anything else.) No doubt such is the case, but I would point out that the question is not what is or was the nature of the instrument, but what was the duty of the Bank towards its customer. (*Ingleby.*—That is a point not taken at the trial.) I think I asked for a nonsuit on that ground; at any rate, I opened that to the jury. (HANSON, C.J.—I do not find it stated in my notes that you did. I think, however, that it is quite open to you to take the point now.) It is forced upon me by the conduct of the other side. This is the first time they have called these documents bills of exchange. (HANSON, C.J.—Certainly they were not spoken of at the trial as bills of exchange, but there was a sort of implied assertion on the part of the plaintiff that there was the same duty arising from them as if they were bills.) (GWYNNE, J.—There is a drawee and a payee, and the order is made payable to bearer. That is a bill of exchange.) (HANSON, C.J.—If you were sued upon such a document, you could not be nonsuited on the ground that it was not a bill.) I should not take the point. But, as I have already said, the question is not what may the instrument be considered, but what was the duty of the Bank. If the Court should think, notwithstanding the circumstances to which I have called attention, that it was their duty to give the notice of dishonour, then I will have to consider the question of damages; and on the grounds put before the Court yesterday by *Mr. Downer*, I submit that it is a case in which the plaintiff is not entitled to more than nominal damages. (GWYNNE, J.—My impression is, though I have not had the time to refer to Mr. Bylcs's work, that if I take a bill, of which I am the third endorser, to a Bank for discount, and they fail to give me notice of dishonour, then the law holds me free, not only from the bill itself, but from the money which I have received in discount.) Most undoubtedly. (GWYNNE, J.—But supposing I simply leave it for collection, and for convenience sake I sign my name so that the Bank may know the customer with whom they are dealing, and that at the time I have not an overdrawn but a flowing account, there is no obligation on their part to give me

notice, and I am not released from liability, though the injury they may have done me is greater in the other case. Is the measure of damages not the same?) I think not. To recover under the second case, an action for negligence would have to be brought, and the damages would be determined by evidence. It would not follow that the measure of damages would be the amount of the bill—

Story on Bailments, 5th Ed., 166, sec. 171c.

Accepting the argument that these documents are bills of exchange, I would submit that the only persons entitled to notice are those whose names are to the bill. They are the drawers, and there is no evidence before the Court that they did not receive notice. I would refer your Honors to the cases that were cited when the rule was obtained, as also

Chitty on Bills, 10th Ed., 309
Byles on Bills, 143, 279.

Shortly, I may put my argument to be this—If these documents be bills of exchange, then there is no proof that the Bank has not done its duty. If they be not, then the sole custom and usage of business between the parties was that the defendants should do their utmost to collect the money, and on that point the evidence clearly shows there was no breach of duty.

Cur. ad. vult.

4 August—

The *Attorney-General* (*Way, Q.C.*), now moved that the cross rule for new trial or increase of damages be made absolute, calling attention to case of

Boyd v. *Pitt*, 14 Ir. C.L.R., N.S., 43.

J. W. Downer showed cause.—The cases cited show that the position of the Bank in this matter was that of gratuitous agent—

Story on Bailments.

If a person is entrusted with the duty of collecting a bill, if he does not actually have the bill there can be no action for want of performance of the executory contract, and even if he gets the bill all he would have to do would be to act so as to preserve the remedies of his customer on the bill. The Irish case just cited is but an elucidation of the principle of the liability of bankers for not honouring cheques when they have funds belonging to the drawer in hand. The damage that could be awarded against a gratuitous agent could only be the amount of the specific bailment. (HANSON, C. J.—I think the question is whether the subsequent damages were not merely contemplated by the parties, but would be the natural result of the breach of duty, and might therefore have been assumed to have been in the hands of the parties.) No doubt; but it is very important to recollect that the Bank was a gratuitous agent, and that as their duty only arose on the instrument they could only be liable to the extent of its value. The plaintiff sought to have the Bank in two ways. First of all he says—"By not noting dishonour, you made these orders your own. You may be considered to have bought them, and so are liable for the whole amount." In the second place he says—"By failing in your duty as regards the first batch of orders I was induced to take more, and now you must cover my whole loss." (GWYNNE, J.—It seems to me that there is a marked difference between this case and those cited on obtaining the rule. In those cases the damage followed the breach of duty without any subsequent act of the party; but in this case they did not flow immediately, and but for the subsequent conduct of the plaintiff might not have flowed at all.) Just so; and that is the distinction that I meant to draw between this case and *Hadley* v. *Baxendale*, 19 Ex., 341. I venture to think that the fallacy of the argument on the other side cannot be more conclusively shown than by asking the question—If the Bank had themselves cashed the first batch of orders, what would have been done by the plaintiff? Would he not have gone on taking the orders? And if he had, would the Bank then have been liable? And ought he not to be confined to the loss he expected he had sustained when he came to town on the stopping of the mine? It must, I think,

be clear that if the Bank had made these orders their own there could have been no breach of duty. (GWYNNE, J.—If the Bank were liable on the second batch of orders, could not Levine, if he had bought shares in the Company, have included them in his claim for compensation?) The cases cited by the other side—

Hadley v. *Baxendale*, 9 Ex., 341; 18 Jur., 358; 23 L.J., Ex., 179
Davis v. *Garrett*, 6 Bing., 716
Phren v. *the Royal Bank of Liverpool*, L.R., 5 Ex., 92,

only show that the damages that can be claimed must be those which are the natural result of and immediately flow from a breach of duty, and that when such is the case reasonable damages can be recovered.

Boucaut (Q.C.), on the same side.—The damages to be recoverable must be in the contemplation of the parties at the time the contract was made. It is impossible to suppose that the argument of the other side is good, otherwise a banker by a breach of duty on a small cheque might be held liable for half a million of consequent damages. I do not think the Irish case cited this morning by the *Attorney-General* can govern the present case. (HANSON, C.J.—It seems to me that that case goes this far—that as the jury may give damages for a general loss of credit, it is competent for the plaintiff to give evidence showing particular injury that may have been sustained.)

The *Attorney-General (Way, Q.C.)*, in support of the cross rule.—I do not think that there are any grounds for the proposition of *Mr. Downer*, that the Bank was but a gratuitous agent. I don't see how, under any circumstances, a Bank can be a gratuitous agent; and even if it could, then it does not help its position, as it is admitted that they had a duty to perform. (GWYNNE, J.—Is it worth while to argue that point? The question whether the Bank were paid or gratuitous agents could only—supposing they have not done their duty—make the amount

of damages a matter of degree.) *Mr. Downer* laid great stress on the point. It must be recollected that in addition to the parties being in the relation of debtor and creditor, the Bank had a duty to perform, and when that is the case it has been established that parties are liable not merely for the amount of the instrument, but also for any damages that may flow from the breach of duty—

Marzetti v. *Williams*, 1 B. & Ad., 415.

The damages must be substantial. There is abundant testimony to bring the case within the second rule of *Hadley* v. *Baxendale*. In the case of

Phren v. *the Royal Bank of Liverpool*, L.R., 5 Ex., 92,

Lord Chief Baron KELLY says that in coming to a decision as to the question of damages all the probabilities of the case should be put before the jury. Mr. Baron MARTIN, who gave a concurrent judgment, says that the damages must be special, and not general; and in perhaps the neatest epitome of the nature of damages demolishes the usual contention—repeated here to-day by *Mr. Boucaut*, that the damages recoverable must be in the contemplation of the parties at the time of the contract—by the very common-sense remark that at the period no one ever contemplates anything else but a fulfilment of the contract. I am quite ready to admit that though the rule laid down by

Hadley v. *Baxendale*, 9 Ex., 341; 18 Jur., 358; 23 L.J., Ex., 179,

has not been narrowed as to the question of damages, exceptions have been made to the rule, and most especially in the case of common carriers, as regards whom it has been decided that whereas by undertaking and accepting the duty of carriers, they are bound to take all goods that may be presented, the merely giving notice that certain consequences would probably flow from their not being delivered at a specified time would not be sufficient

to ensure an award of extraordinary and peculiar damages, and that to ensure substantial damages the notice must be included within the contract. The Court here has not to infer what was the contract, because that question was sent to the jury and decided in my client's favour. *Mr. Downer's* argument as to what would have been the effect of the Bank making the orders their own is disposed of by the fact that the Bank having expressly given notice that they would not do so, but that they simply held them for collection, Mr. Levine could never have supposed that such was the case. Even if it was, Mr. Levine as the customer of the Bank was entitled to notice of the dishonour of these bills. Further, Mr. Levine had had a special conversation with Mr. Souttar, which was as binding as if it had been a written contract on this very question, and he had been assured that he should have notice.

Ingleby (Q.C.), on the same side.—It lies with the defendant to prove that the damages have been less than the value of the instrument.

Cur. ad. vult.

7 October—

Judgment herein was now delivered as follows:—

HANSON, C.J. (after stating the pleadings.)—Upon the trial before me, the orders in respect of which the plaintiff's claim arose were treated by counsel on both sides as though they were orders upon which the Prince Alfred Mining Company were liable. They were put forward in that character by the plaintiff, and that view was acquiesced in by the defendants, who were bankers for the Company; and the only contention was as to the liability of the defendants, whether they had given proper notice, or what damages had accrued to the plaintiff for their not having given such notice of their not having been accepted or paid. I accepted this view, and directed the jury in accordance with it; but after hearing the arguments addressed to the Court on the rule, and more carefully considering the nature of the orders, the Court are of opinion that this view was mistaken—that the Company was not liable upon these orders, because they had never been accepted by them. It

is not necessary to discuss the question whether the Company would have been liable if the Secretary, upon whom the orders were drawn, had accepted them, since he had not done so. The orders were not drawn in the name or on behalf of the Company, and, therefore, were not within the clause in the Companies Act, so that the Company was not liable as drawers any more than as acceptors. That, however, does not conclude the question as to the liability of the Bank, but it alters the conditions upon which the liability would depend, and as the points thus raised have not been submitted to the jury, there must be a new trial. The second rule must fall, for there was nothing to support the finding of the jury as to damages. The rule for a new trial will, therefore, be made absolute, and that to increase the damages will be discharged.

Rule absolute for a new trial.

HANSON, C.J., STOW, J.] [COMMON LAW.

21 OCTOBER, 1875.

IN THE MATTER OF WILLIAM KING, INSOLVENT.

INSOLVENT ACT, 1860, *Sec.* 125.—Habeas Corpus—*Order—Warrant—Scienter—Bail—Appeal.*

It is not a necessary ingredient of the offence of obtaining forbearance by means of false pretences within the meaning of Section 125 *of the Insolvent Act*, 1860, *that such pretences should have been false within the knowledge of the Insolvent, or made with intent to defraud, nor need the order or warrant for imprisonment aver such knowledge or intent.* (Ex parte *Fischer*, 8 S.A.L.R. 57, *overruled.*)

The warrant for imprisonment under the above Section need not set out all proceedings prior to the order, which is in itself sufficient authority for the issuing of the warrant.

The Supreme Court has no jurisdiction to admit a prisoner in custody under an order of the Commissioner of Insolvency to bail until appeal entered.

THIS was a writ of *habeas corpus*, calling upon the Sheriff and Keeper of the Gaol at Adelaide to bring up the body of William King, in prison under an order of the Commissioner of Insolvency. The warrant under which the prisoner was detained set out the order, but did not recite the prior proceedings. The order as set out in the warrant alleged that the prisoner had obtained the forbearance of certain specified creditors by false pretences, but contained no averment of *scienter* or intent to defraud.

The *Attorney-General (Way, Q.C.)* and *J. W. Downer* now moved that the prisoner be discharged.

THE COURT decided to hear counsel for the insolvent first.

The *Attorney-General (Way, Q.C.).*—I move that the prisoner be discharged on the ground of a decision already given by this Court—

In re *Fischer*, 8 S.A.L.R., 57.

(HANSON, C.J.—I was not present at the time that decision was given. I think it was an improvident decision.) (STOW, J.—The case of *Regina* v. *Bowen* is decisive on the point. If the Court had had its attention called to that case, it would not have decided as it did in Fischer's case.)

Ingleby, in support of the warrant.—The case of

Regina v. *Watkinson*, 26 L.J., N.S., 853,

is still stronger, as it is a decision on the Bankruptcy Act. There is a great distinction between the present case and that of

Regina v. *Bowen*, 13 Q.B., 790; 13 Jur., 1045.

(HANSON, C.J.—The order is in the very words of the Statute.) The mere falsity of a statement cannot give the Court jurisdiction. (HANSON, C.J.—Yes, if anything was obtained by it.) The decision in Bowen's case was that of a superior Court and not of an inferior Court. As pointed out in Fischer's case by Mr. Justice STOW, then at the bar, a man might under such an order be made liable for the act of his agent committed without his knowledge. Watkinson's case was on a Statute which simply required a statement of words in the Statute to be proved. The same remark applies to Bowen's case, and but for that the Court would have held that the indictment was bad (*vide* judgment of Mr. Justice WHITEMAN, who was referred to

Regina v. *Henderson*, 2 M.C.C., 192,

in which the point was left open). In such a case any defect would be cured by verdict. That is all Lord DENMAN says in Bowen's case. It was necessary in the present case to show the act was done knowingly or designedly. Even in Watkinson's case, Lord Chief Baron KELLY said the present objection would be good at Common Law. There is another objection to the warrant, and that is that an order for imprisonment can only be made at the

time of hearing (*vide* 125th section of the Insolvency Act). There is nothing in the proceedings to show when the order for imprisonment was made.

J. W. Downer, on the same side.—The cases quoted, though they show that *scienter* is not necessary to constitute the offence, also show that the Legislature contemplated its being one of the ingredients of the case.

Regina v. *Henderson*, 2 M.C.C., 192,

is still law, and the case decided that *scienter* is necessary. This is a criminal offence, and *scienter*, and that it was done designedly must be proved. (STOW, J.—The order says he falsely obtained.) But not that he did it designedly. (HANSON, C.J.—*Regina* v. *Henderson* was argued as if the words "knowingly and designedly" were in the Statute. Just before the case was argued, the Statute was altered and those words struck out.) Yes; but it proves, whether the words are in the Statute or not, that it must be an ingredient of the offence. (STOW, J.—The words "with intent to defraud" are not in our Statute, so that if a man obtain goods by a false pretence, he is guilty of an offence.) (HANSON, C.J.—And for that reason the argument is bad.) To overrule the previous decision of the Court, some strong authority must be shown. The case quoted is, I submit, not sufficient to induce the Court to override its own solemn decision; and the cases quoted are in our favour rather than against us. At the most, they only raise a state of doubt. Is the warrant good if it does not recite the order? (STOW, J.—I think the case of *ex parte* Sellar decides the point. If the prisoner is in the custody of the gaoler, the judgment is enough.) (*Ingleby.*—The warrant does state that it was after the last examination.) (STOW, J.—Would not the order itself be sufficient?) I think not, because there is a warrant. (STOW, J.—The warrant is only necessary for his being taken down.) Then the prisoner will have to be discharged, because the gaoler will have no justification for detaining the prisoner. The warrant, and not the order, is returned. If something more than the warrant

is necessary, then all conditions precedent must be given. So that whichever way the Court likes to look at the matter, I contend that the order for imprisonment is bad. The Commissioner must decide the case as the law stood at that date. The state of the law was then that stated in Fischer's case, and with that the Commissioner has not complied. (*Ingleby.*—I would refer to 7th George IV.) (STOW, J.—That only applies to Superior Courts.)

HANSON, C.J.—This is a motion to discharge the prisoner on the grounds—(1), that according to *ex parte* Fischer, the warrant under which the prisoner is held in custody does not show that any order has been made setting forth sufficient grounds for the imprisonment; and (2), that the warrant is bad both on the ground that it does not set out such an offence as would justify the imprisonment, and that it does not show that the order under which the warrant was issued was made at the last examination of the insolvent. As regards the first point, we have been pressed on the one hand by the case of *ex parte* Fischer—a case decided by this Court—and the case of *Regina* v. *Henderson;* and on the other side by the case of *Regina* v. *Bowen.* With reference to the case *ex parte* Fischer, as I have said during the course of the argument, I feel bound to say that I was not present when it was heard, and that I think it was improvidently decided. Both of the learned Judges who were present gave as a reason for giving judgment without consideration that it was a matter calling for immediate decision, and the consequence was that the case did not receive that consideration that it deserved. Therefore, unless satisfied with the grounds on which the decision was arrived at, it is not one by which I should feel myself bound. This is a proceeding under the Insolvent Act, No. 15 of 1860, Sec. 125, and the third subdivision of the section states—"If the insolvent shall have contracted any of his debts by any manner of fraud, or by means of false pretences have obtained the forbearance of any of his debts by any of his creditors," he shall, according to the main part of the clause, be liable to be imprisoned at the suit of the assignees "for any period not exceeding in the whole the period of three years;" and the very language of the clause, in my opinion,

of itself negatives the necessity of any statement that the matter was knowingly and designedly done. This is not part of the offence, nor is it a question contemplated by the clause, for one who makes a false pretence by which he induces a person to give credit may do as much injury and be just as much a wrongdoer if he does it from ignorance or knowingly and with design. It is a matter on which there ought not to be ignorance. A man is bound to be aware of the state of his own affairs, and he has no right to make false representations, even if he be not fully aware of the extent to which they are untrue. Even if he did not know it was false, he would be guilty of an offence according to the policy of the Insolvent Law, and rightly liable to punishment. And the law cannot be complained of, for it has left it entirely to the judgment of the Commissioner to fix the amount of punishment. Though a statement such as that suggested during the course of the argument, that a man might make representations as to debts of which he must be necessarily ignorant, might affect the amount of the punishment awarded, still it could not affect the power of the Commissioner to imprison the debtor. That being the case, and the order following the very words of the Act, and setting out an offence therein contained, for which it is said the debtor shall be liable to punishment, I think the order good. It is very true that the decision in *Regina* v. *Bowen* was given because the order was after the verdict; but it is very clear that the learned Judges who decided that case were not satisfied with the decision in *Regina* v. *Henderson*, and that they were prepared to overrule it if it had been necessary for the purpose so to do. It has been said that the warrant must set forth the previous proceedings, but no authority has been cited for the purpose of showing that that is necessary, and I think it need not contain such a report. The Commissioner is authorized under certain circumstances to make an order for imprisonment, and that order is in itself a sufficient authority for the issuing of the warrant; and such being the case, nothing more is necessary than has been done on the present occasion—to set forth the order itself in the warrant.

STOW, J.—I agree most fully with the judgment that has just

been delivered, and I have little to add to the very full decision of the Chief Justice. As to the first point, the words of the Insolvent Act, quoted by the Chief Justice, make it quite clear that it is sufficient to prove any pretence to have been made, without proving that it was done knowingly or designedly, to entitle the Commissioner to make an order to hold the insolvent in gaol at the suit of the assignees. As regards the other point, as the Chief Justice has remarked, no authority has been cited in its support, and to me it appears utterly untenable. The object of the Legislature in instituting these short forms of orders, was to prevent the likelihood of justice being defeated in consequence of mistakes which might easily occur in setting out all the proceedings in the warrant, and if we were to entertain the objection that the setting out of the order itself was an insufficient justification for the detainment of the prisoner, we should be defeating the objects of the Legislature. In my opinion, if the order itself be set out in the warrant, that is sufficient, and anything more is unnecessary. The writ must be quashed.

Writ quashed.

HANSON, C.J., GWYNNE, J., STOW, J.] [MATRIMONIAL.

8 SEPTEMBER AND 27 OCTOBER, 1875.

MAY v. MAY.

DISSOLUTION OF MARRIAGE.—Condonation—Revival—Costs.

In a suit for a dissolution of marriage heard before a Judge without a jury the Judge found the following facts:—

That some two years prior to the filing of the petition the respondent was living with another woman as his wife—That the petitioner, knowing this, continued to cohabit with her husband—That subsequently she left her husband, and lived for two years with a friend; at the end of which time the petition was filed—That subsequently to the filing of the petition the respondent visited and cohabited with the petitioner, she knowing at the time that he was living with and intended to continue his intercourse with another woman.

Held—*That the former adultery and cruelty were not revived by subsequent intercourse by the respondent with the woman above referred to, the renewal of such intercourse having been contemplated by the petitioner when the former offences were condoned.*

Where the petition is dismissed under issues presented to the Court, but owing to investigation ordered by the presiding Judge, petitioner's costs will be allowed.

THE facts being as stated in the head-note,

Barlow, for petitioner, asked for a decree *nisi* for a dissolution of marriage or for a conditional order for a re-hearing, on the ground that the finding was against the weight of evidence and erroneous in law, as adultery, not having been condoned, the acts of cruelty on the part of the respondent against his wife, though condoned, had been revived.

McQueen on Husband and Wife

shows that a wife, though she may suspect improper conduct on the part of her husband, is entitled to wait until she has legal proof. The condonation, if any, has not been sufficient to constitute a bar to a decree. The Matrimonial Causes Act, Secs.

32, 33, state that if the petitioner's case is proved, and there is no collusion between the parties, the Court should pronounce a decree *nisi*; and in

Gipps v. *Gipps and Hume*, 33 L.J., Mat. Cas., 161,

the House of Lords held that the compromise of a previous petition was not a connivance, and that connivance must be something present or passing before the eyes of the petitioner. Though there were strong probabilities that she did not know what was going on, there was nothing which showed that she came within the definition laid down by Lord CHELMSFORD. Mere inattention or indifference would not be sufficient—

Browning on Divorce, 83-86.

The question was whether, in the act of alleged condonement, the petitioner had acted with a corrupt mind. (STOW, J.—As there has been condonation subsequent to the date of the petition, there must be a fresh petition to deal with the subsequent revival of the adultery and cruelty.) The point was advanced subsequent to the judgment in

Suggate v. *Suggate*, 1 S. & T., 490; 8 W.R., 178.

Even if the evidence had been objected to at the trial, a fresh petition for the subsequent acts could have been filed; the two consolidated and decided by one trial. Admitting that there had been condonation subsequent to the date of the petition, it has been neutralized by the repetition of the respondent's misconduct. (GWYNNE, J.—Condonation is only conditional forgiveness, to be withdrawn if there is a relapse into evil habits.) The case of

Keats v. *Keats and Montezuma*, 1 S. & T., 334; 5 Jur., N.S., 176; 32 L.T., 321,

shows that there must be nothing short of reconciliation to deprive the right to a divorce—

Browning on Divorce, 83.

What was done was not condation—

Ellis v. *Ellis*, 34 L.J., Mat. Cas., 100.

(STOW, J.—It is either a reconciliation or a display of utter indifference as to what respondent was doing. That would be a complete bar to the petition.) In

Newsome v. *Newsome*, L.R., 2 P. & D., 306,

there was a written agreement to condone, and it was held that there was no condonation as there had been a particular agreement which did not come to a reconciliation, and failed to restore the husband to his original position. Cohabitation it is also there said does not amount to condonation. There is nothing in the evidence to show that the petitioner ever meant to be reconciled to her husband, and she is therefore entitled to a decree *nisi* for dissolution of marriage.

Cur. ad. vult.

27 October—

Judgment herein was now delivered by STOW, J.:—

This is a suit for a dissolution of marriage promoted by the wife on the ground of adultery coupled with cruelty. The respondent replied, denying the charges of adultery and cruelty, and pleading condonation of the adultery and cruelty, and that the cruelty was provoked by the conduct of the petitioner; and the petitioner replied that the condoned adultery and cruelty had been revived. The case was tried before me without a jury on affidavits, and although attended by counsel for the respondent, was virtually undefended. The adultery and cruelty by the respondent were clearly proved by the affidavits of the petitioner and her witnesses. I ordered her to be produced and examined, and she was so, and thereupon it appeared that the adultery complained of was with one Ellen Washington, who was proved to have been living at the respondent's house when the petitioner returned there after an absence therefrom of several months occasioned by the imprison-

ment of the petitioner for default of bail to keep the peace to the respondent. The criminal intercourse between the respondent and Ellen Washington has continued ever since, and she has borne children to the respondent, and they, at the hearing, were still living together as man and wife. When the petitioner returned to her husband's house after her imprisonment, she found Ellen Washington and her child living there, and the suspicions of the petitioner as to the connection between her husband and the woman were at once aroused by the refusal of her husband and of the woman herself to give her name, which was discovered by the petitioner's enquiring of Mr. Bee, the Keeper of the Destitute Asylum, whence the woman had been taken by the respondent. The petitioner, after this, remained, and lived with her husband as his wife for some days, when, being in bad health, she went to the Hospital, and then returned and lived with the respondent as his wife for about four days, until his ill-treatment compelled her to leave. During the whole of this time Ellen Washington was living at the house, and the facts convince me that the petitioner, whilst she continued marital intercourse, was well aware of the nature of the relations between her husband and this woman. The petitioner was away from her husband for about two years living with a friend, and the respondent in 1865 or 1866 called on her. They lived together as man and wife for some days and nights on an arrangement that the respondent was to get rid of Ellen Washington, and that when he had got rid of her the petitioner was to go back to him. She did not return, but some time after filed the petition in this suit against him. Shortly after the petition was filed the respondent called with a friend on the petitioner, who was then living at the Phœnix Hotel, in Adelaide, and introduced his friend to her, stating that she was his wife; and, although these proceedings had been commenced, and Ellen Washington still continued with the petitioner's knowledge to live in adultery with the respondent, and without any arrangement or even suggestion of improved conduct on his part, or that he should discontinue his connection with Ellen Washington, the petitioner cohabited with him, and he then returned to his former state of life with Ellen Washington. So far as regards the issues raised

in the pleadings, my findings are that the adultery and cruelty were proved, that the cruelty had been condoned and not revived, and that acts of adultery had not been condoned. This finding would, in my opinion, prevent the Court from pronouncing for a dissolution of marriage, even if the Court should think that the evidence showed adultery coupled with cruelty uncondoned, or, if condoned, revived. The only remedy, if my finding was wrong, would, it seems, be by a new trial. But it is not necessary to consider what would be the proper course if my finding as presiding Judge is not according to evidence, because the duty is cast upon the Court to enquire, irrespective of the issues, whether there has been any condonation, or whether the petitioner has been accessory to the adultery, or has connived at it, and the examination of the petitioner shows that she, if not accessory to the adultery, has connived at it. Admitting, as I do, the difference between forgiveness on the part of a wife and that on the part of a husband, and taking into account also that great allowances are to be made for the situation in which a wife is placed and the difficulty she would have on leaving, and her unwillingness to drive matters to extremity, and without deciding whether her having continued to live in the same house with her husband's concubine, and thus, as in *Kirkwall* v. *Kirkwall*, 2 Hag. Con. 277, sharing the turpitude of her crime and partaking of a polluted bed, or whether her cohabitation with him in Adelaide under the promise to put Ellen Washington away would be sufficient to induce the Court to refuse relief, I am of opinion that the circumstances connected with her cohabitation with her husband at the Phœnix Hotel are such as to show an utter indifference to his conduct, and that she thus condoned all past acts and connived at all future acts of adultery with Ellen Washington, and that thereby she is deprived of any right to a decree. The cohabitation on this occasion was not under compulsion, and took place when the husband was living in adultery, and when the wife must have anticipated that it would continue, and, moreover, it took place after the institution of this suit. No doubt, the effect of condonation after the suit is instituted may be removed by a revival, but the acts of adultery with Ellen Washington which took place after the cohabitation

between the petitioner and respondent subsequently to the commencement of this suit cannot have the effect of reviving the condoned offence, inasmuch as the petitioner must have anticipated the continuance of the criminal connection which then existed between the respondent and Ellen Washington. Therefore she cannot complain of these subsequent acts of adultery, for *volenti non fit injuria*. As all the acts of cruelty and adultery have thus been condoned or connived at by the petitioner, the petition should be dismissed. On the authority of the case of *Todd and Todd*, L.R., 1 P. & D., 121, I think that as the petitioner succeeded on the main issues raised, and the petition is dismissed on facts elicited from the petitioner by the presiding Judge, showing condonation subsequent to the filing of the petition, the petitioner's costs should be allowed. This judgment is accepted by my learned colleagues as the judgment of the Court. Petition dismissed. The petitioner's costs to be paid by the respondent. On the authority of *Todd* v. *Todd*, the petitioner's costs will be allowed, as the petition was not dismissed on the issues presented to the Court, but owing to the result of the investigation ordered by the presiding Judge.

Petition dismissed.

HANSON, C.J., STOW, J.] [COMMON LAW.

28 OCTOBER, 1875.

IN THE MATTER OF WILLIAM KING, OF STRATHALBYN, DEALER, AN INSOLVENT.

INSOLVENT ACT, 1860, *Sec.* 121.—*Appeal—False Pretences.*

An insolvent was imprisoned by the Commissioner of Insolvency for having contracted a debt with A by means of a false statement that he did not owe anybody else anything, whereas in fact he owed B £204.

There was no evidence elicited at the last examination of the existence of the debt to B at the time when the debt to A was contracted beyond the schedules previously sworn to by the insolvent, and which showed that the insolvent was, at the time of his insolvency, indebted to B in the sum of £311, incurred between 1873 and 1875, and was, in May, 1874, the time of the alleged misrepresentation, indebted to B in the sum of £204.

The false pretence charged was that the insolvent having previously purchased certain cattle from the principal of A, an auctioneer, told A not to put these cattle up for sale, and on the auctioneer demurring made the false statement charged; and A deposed that in consequence of such statement he allowed the insolvent to take the cattle so previously purchased and to purchase other cattle during the sale, for the purchase-money of all which cattle the insolvent gave an acceptance to A.

Held—*That there was sufficient evidence of the existence of the debt to B at the time A's debt was contracted, and that the Commissioner was justified in assuming that the false statement operated and was intended to operate on A's mind during the sale and induced him to give credit.*

APPEAL from an order of the Commissioner of Insolvency committing the insolvent to prison for six months.

J. W. Downer, for the insolvent, read the evidence, which contained no statement of the indebtedness to Thomas King at the time the debt to Cheriton was contracted.

The charge upon which the insolvent was committed was for having on the 4th March contracted a debt for £185 with John

Cheriton by stating that he owed no one else anything, whereas he owed Thomas King £204.

STOW, J.—That does not prove that he owed Thomas King anything.

Ingleby, for the opposing creditors.—But the insolvent swears to his schedule. Will your Honors kindly refer to see who are the petitioning creditors? (STOW, J.—I don't see how that would help the case. Is he bound by examinations that have taken place when his attention was not called to the charge?) Section 121 of Act No. 15 of 1860, "An Act to amend the Laws relating to Insolvency," says—"That at the sitting appointed by the Court for the last examination of the insolvent, and at every adjourned sitting thereof, the Court shall examine into the balance-sheet and schedule of the insolvent, and into his dealings and transactions, and as to his property and effects." (STOW, J.—Could he be convicted on the report of the accountant?) It would be an element of the Commissioner's judgment. (STOW, J.—Only as regards the certificate. I remember the time here when insolvents were imprisoned without any charges being gone into.) (HANSON, C.J. —We can only look at what took place at the last examination.)

The *Attorney-General (Way, Q.C.)*, and *J. W. Downer*, for insolvent.—The insolvent admits the debt to Thomas King, but says he does not know when it was incurred.

STOW, J.—It may then have been all incurred subsequent to the date at which the debt with Mr. Cheriton was contracted.

Ingleby.—There is the schedule. He swears he owed the money.

STOW, J.—Yes, from 1873 to 1875. Suppose it was all in 1875?

HANSON, C.J.—We may guess and very well surmise that it was then due, but is there any proof that such was the case?

STOW, J.—The test is—suppose the insolvent is charged with

perjury for making a false declaration, and it was shown that all the debt was contracted in 1875, could it be said he had made a false declaration?

Ingleby.—There is a distinction between after verdict and after sentence.

STOW, J.—No. We are a Court of Appeal on facts as well as on law in this instance.

Ingleby.—Yes; but the Lord Justices hardly ever interfere on questions of fact except when the matter is very doubtful.

HANSON, C.J.—If there was evidence to go to the jury—and in such a matter that is the light in which the Commissioner's judgment must be viewed—I should agree with you, and I should not set my opinion in reference to the bearing of the evidence against that formed by the Commissioner. The question now raised, however, is this—Is there any evidence?

Ingleby.—I submit that there is in the balance-sheet signed and declared to by the insolvent. He says he was owing Thomas King money from 1873 to 1875. That is evidence to the jury. They would have a right to infer some of it was contracted in 1873. Whether all or only a part would be immaterial.

HANSON, C.J.—The accountant's report says the insolvent on starting business in May, 1874, owed Thomas King £204 odd.

STOW, J.—When was the last examination?

The *Attorney-General (Way, Q.C.)*—14th September, 1875. But the declaration has nothing to do with this matter. *Mr. Ingleby* has quoted a portion of the 121st section of the Act, No. 15 of 1860, and I would again refer your Honors to it. It says that what is done at the last examination must be done "upon the oath of the insolvent and of such parties and other witnesses as the Court may see fit to examine thereupon."

Ingleby.—This is on oath.

The *Attorney-General (Way, Q.C.)*—But it is for a different purpose. It is a statement that he has surrendered all his property, and it is one on which the Commissioner will come to a conclusion as to what class certificate the insolvent should be awarded. But it has nothing to do with his imprisonment. That can only be done on sworn evidence.

Ingleby.—The words on which the *Attorney-General* is relying have been repealed. Act No. 13 of 1867, "An Act to amend the Insolvency Act, 1860," section 7, says, "Notwithstanding the 121st section of the Insolvency Act, 1860, every insolvent may be examined without having been sworn."

The *Attorney-General (Way, Q.C.)*—But the clause does not touch the point I am taking, that the examination must be directed to the charges that are made.

After a consultation,

HANSON, C.J.—I think you must go on, *Mr. Attorney.*

The *Attorney-General.*—But the balance-sheet does not show how much he owed Thomas King. All it shows is this:—Money lost in trade, £188; trade expenses, £239; profit made on bran, chaff, and sundry other things, £121 19s. 5d.; loss by sale of effects under judgments, £137; living expenses, £76. It does not in any way represent his receipts and expenditure. There is nothing by this document to show that at the time Mr. Cheriton's debt was contracted the account between William King and Thomas King was not at a credit to William King. The evidence does not attempt to deal with the question. On the other hand it says the insolvent was receiving and paying large sums of money. He was dealing in stock, and in fact carrying on the business of a dealer to a very considerable extent. All that the accountant's report shows is that the insolvent commenced business with a

minus sum instead of with capital; but there is nothing in the evidence to show that that amount was not reduced by transactions between William King and Thomas King. The evidence was not directed to that point at all; and it is quite consistent with the other facts of the case that at the time Cheriton's debt was contracted Thomas King was not owed a single sixpence. That is not the sort of evidence on which a man ought to be sent to prison. In a *quasi* criminal case, as this is, the evidence on which the decision was arrived at ought to be quite clear, that the debt was contracted by means of a false pretence. There is nothing whatever in the evidence to warrant the finding of the Commissioner. The evidence lies in a nutshell. The insolvent on the one hand says he made no such representation; Mr. Cheriton, on the other side, who is evidently labouring under an angry feeling, does all he can to support the charge. Mr. Cheriton's claim is a compound one, being made up of two items, one for £101 for eleven head of cattle sold to insolvent, not by Mr. Cheriton, but for Mr. Stark before the auction took place; and the second for £84 odd for cattle sold by Mr. Cheriton to the insolvent during the auction on the 4th March at Strathalbyn. In the examination-in-chief it was put in rather a confused manner, so as to lead to the belief that all the cattle in question were sold to the insolvent by Mr. Cheriton, but on cross-examination the real facts as I have just stated them appeared. There is nothing whatever in the evidence to show that Cheriton had anything to do with the £101 item. There is nothing whatever to show that the contract was not completed between Stark and the insolvent before the latter saw Cheriton on that day at all. There is nothing whatever to show that Cheriton would have been justified in refusing to deliver the goods of his principal. There is nothing whatever to show that it was necessary for the insolvent to make Cheriton a payment so as to get the cattle; still less is there anything to show that Cheriton was in such a position that he could have repudiated the action of his principal, and so decline to complete the contract. There is nothing to show what was the contract—whether it was verbal or in writing, or what were the terms. A conversation, according to the evidence, took place

between Cheriton and the insolvent just before the auction commenced. Apparently from its tenor it was one of a character which had taken place several times before. Cheriton said to insolvent, "You are carrying on too fast." Insolvent replied, "Do I owe you anything? I have plenty with which to pay everybody. I am doing very well. I can pay when I sell the cattle." Subsequently he says—"I do not owe anybody but you." Now, what was the meaning of this conversation? Do not the words "I have plenty to pay everybody" imply that he owed other persons money? It will be seen that the conversation admits of more than one construction. It is a monstrous thing that an attempt should be made to put a gloss upon such a conversation and try and wrest from it a conclusion by taking one part without the context. It is plain that he meant to pay the debt by the proceeds of the cattle. Is there anything to show that this debt of £101 was contracted with Cheriton? (STOW, J.—Cheriton gave him credit.) Yes; but it doesn't follow that Mr. Cheriton was not entitled to recover this amount from his principal, Mr. Stark. The fact that this £101 is included in the acceptance may be very easily explained. The insolvent had bought cattle from Mr. Stark, and he subsequently bought cattle that Mr. Cheriton was selling for Mr. Stark. Very likely, for the sake of convenience the two amounts were included in the one acceptance. It also does not appear from the evidence—and it is quite consistent in all the facts—that any credit was obtained by the insolvent in consequence of the conversation to which I have just referred. There is nothing to show that Mr. Cheriton was a *delcredere* agent of Mr. Stark. There is nothing to show that the insolvent asked for credit; nay, more, there is nothing to show that Cheriton was entitled to demand cash or an approved bill, or anything of the sort. The evidence, so far as the £101 item is concerned, only shows that there was a contract for the sale of certain cattle between Mr. Stark and the insolvent, which was fully completed before the alleged misrepresentation was made. And there is nothing whatever to show that the relation of Cheriton to Stark was such that the debt was a debt incurred to Cheriton. There is nothing to show that at the time the conversation took place the

insolvent intended to buy any more cattle. He did not go to Cheriton for the purpose of obtaining credit. The conversation was a merely casual one. It had reference to a completed transaction, and had nothing whatever to do with what might transpire at the sale. From what Mr. Cheriton says, it is very likely that it was from some representation of his own that the insolvent was induced to make a further purchase. In consequence of some representation made by Cheriton at the time of sale, in consequence of cattle going cheap, or in consequence of their superior appearance when exhibited, the insolvent bought the cattle; but there is nothing to show that he made any false representation. If it is to be said that a statement made at one time is to affect subsequent transactions, then there will be a great enlargement of the operation of the Insolvency Act, to a most extraordinary and alarming extent. For a misrepresentation made innocently or by mistake, or from braggadocio, and without any intention whatever of committing a fraud or falsely obtaining credit, a man might at any moment run the risk of losing his character, and being taken away and his liberty curtailed. I do trust that your Honors will not create a precedent that would warrant such a state of things being possible.

J. W. Downer, on the same side.—I propose in support of this appeal to follow the points taken by the *Attorney-General*. (STOW, J.—I see Cheriton in his evidence says the insolvent asked to have the eleven head of cattle put to his account. What does that mean?) That was done simply that Cheriton might be able to regulate his account as against Stark. The cattle were in Cheriton's hands, and if he had not done that, they would have been put up for sale. He incurred no debt by doing that. (STOW, J.—But did he not incur a debt by putting his name to the bill?) No representation was made then. That was after the whole thing was done. The whole matter has to be tested by the question—Was there any misrepresentation at the time of each transaction? Surely your Honors will place no reliance upon the conversation given in the evidence. It is the merest babble of the auction-room. On the face of it it is incoherent, and incon-

sistent within itself. The insolvent asks, "Do I owe you anything?" when in very fact he owed £187 on current bills. (HANSON, C.J.—That may be viewed in two lights. The bills were not due, and he might have considered that he owed nothing till they matured.) That argument might apply to this debt of Thomas King. Mr. Cheriton got nearly all the proceeds of the sale. He had £134 from the Bank; he levied on those that were left. He has actually received £60 odd on this very bill. Further, the estate has never been damnified by this debt to Thomas King. He is not like an ordinary creditor. He is the son of insolvent, and he has never pressed his claim. He is not like a creditor who, hitherto unknown, turns up to swallow nearly the whole of the estate, to the detriment of the other creditors. *(Ingleby.*—The statement as regards Mr. Cheriton is incorrect.) No fraudulent intention has been proved. (HANSON, C.J.—That is not the charge.) Cheriton proved on the acceptance. *(Ingleby.*—He proved on a judgment setting forth other bills.) There is nothing to show that he went to Cheriton for the purpose of credit. (STOW, J.—He wanted to get the cattle without paying for them.) The presumption is all the other way. Besides, by the very terms of the sale he was entitled to three months' credit.

HANSON, C.J.—We need not trouble you, *Mr. Ingleby.* This case comes before us by way of an appeal from the decision of the Commissioner of Insolvency, ordering the imprisonment of the insolvent on the ground that he incurred a certain debt of £185 odd from Mr. Cheriton, the opposing creditor, by means of a false pretence—the pretence being that he did not at the time owe anything to anybody save Mr. Cheriton—whereas, in fact, at that period he owed a sum of £204 to Thomas King. With regard to the first point suggested by my learned colleague, that there was an apparent failure of proof as to the debt of Thomas King, after looking through the whole of the proceedings I am convinced that there is sufficient proof of the insolvent's indebtedness in the sum of £204 to Thomas King at the time the representation was made. The Commissioner is bound, in deciding upon the certificate to which the insolvent is entitled, and upon the punishment which

the insolvent may have incurred, to look at the schedule; and by the schedule it appears that at the time of the insolvency the insolvent owed Thomas King £311. incurred between 1873 and 1875, and that in May, 1874, the amount was £204. When that is the state of accounts between them, it appears to me a presumption that the Commissioner was fully justified in drawing that this sum remained due until the time of the insolvency. Then it is said that there was no pretence, as the cattle were not bought of Mr. Cheriton. Now, the defendant is not charged with having obtained the cattle, but with contracting a debt, and the evidence of his liability for that is altogether independent from the question whether in the first instance he bought from Mr. Stark or not, and rests on the bill for £185. What are the facts? On the morning of the sale—that is the effect of his evidence—and as the first lot was immediately about to be put up, he tells Mr. Cheriton that he has bought them, and he asks Mr. Cheriton to put them down to him. Then Mr. Cheriton raises an objection, which takes the form—though done in good part—of intimating—"I don't know that I am justified in doing that." Then the insolvent said, "I don't owe anybody else but yourself." It appears that at the time there were current bills, which had been given by the insolvent, but which were not due, but on which, though he could not be called upon to pay, he was liable to the creditor. He makes a declaration that he has no other creditor, and Mr. Cheriton swears he let him have the cattle, including both the eleven sold by Stark and those sold during the auction, on the faith of the declaration. That clearly was a false pretence, and a false representation of the position of his affairs to obtain credit. And can it be thought that that representation did not operate through the sale? They would both be acting upon it—the one with the full knowledge that it had been made with the object of affecting the mind of the other, and it would be accepted by the other as a reason for giving the credit asked. Supposing that after the lot had been put up on the suggestion of the insolvent's name as the purchaser a conversation of the same sort had taken place, would not that be said to affect all the other transactions? I think there are no grounds for drawing a distinction between the

eleven head of cattle and those that were sold during the auction by the opposing creditor himself, and I think therefore there was evidence to justify the Commissioner in deciding that the debt was contracted by a false pretence.

STOW, J.—I agree with the judgment just delivered by the CHIEF JUSTICE. I have very little to add to what he has said. At first it appeared to me that there was some doubt whether the debt due to Thomas King was proved; but when I found that the Commissioner by the Act is bound in considering the certificate and perhaps punishment to be awarded to the insolvent at his last examination to look at the schedule, and that that schedule, not only signed, but sworn to by the insolvent, shows that in May, 1874, he owed Thomas King £204, and that at another part of the schedule that he owed at the time of insolvency £311 to Thomas King, I think the Commissioner was justified in arriving at the conclusion he did, as it would be a fair presumption that the £311 was partly made up of the £204 due in May, 1874. That the debt was contracted by a false pretence is abundantly clear by the evidence of Mr. Cheriton. Mr. Cheriton swears that the representation was made when he objected to allow the cattle to be taken on credit; that on the faith of that representation the cattle were delivered, and the bill of exchange taken for their price. As regards the point of the representation not being false in intent, if the *mens rei* be necessary in such a case—of which I have very considerable doubt—I think there was abundant evidence to justify the Commissioner in concluding that the insolvent knew he was making a false statement of his affairs. There are cases in which persons may be indebted without knowing it; but these cases are rare, and in the present case I cannot but think that the insolvent knew he was making a statement that was wrong. I therefore concur in the judgment of the Chief Justice.

Appeal dismissed without costs.

HANSON, C.J., GWYNNE, J., STOW, J.] [COMMON LAW.

29 OCTOBER, 1875.

DAVIS v. BAMBRICK.

ACT No. 8 of 1865-6.—Information—Crown Ranger—Certiorari.

Informations under Section 2 of Act No. 8 of 1865-6 should be laid by the Crown Ranger, and certiorari will lie to quash a conviction on an information laid by any private person.

RULE *nisi* calling upon Messrs. Moorhouse and Stokes, the Justices of the Peace at Mount Remarkable, to show cause why a writ of *certiorari* should not issue to bring before the Supreme Court a conviction against the defendant for having on the 17th July, 1875, occupied and resided at Mattawarangala on the waste lands of the Crown, on the grounds that the plaintiff, not being a Crown Ranger, was not entitled to lay the information, and that the land was not the waste lands of the Crown; that the penalty inflicted was excessive and beyond the law; and that the order to pay the costs to the Clerk of the Court was erroneous.

J. W. Downer now moved that the rule be made absolute.

Ingleby, Q.C., showed cause.—The information in question is laid under Act No. 8 of 1865-6, "An Act to amend Act No 18 of 1858, intituled 'An Act to amend the Waste Lands Act,'" Section 2 of which provides that—"Any person, unless claiming under a sale or demise from Her Majesty, or from some person acting in the name and on behalf of Her Majesty, who shall be found unlawfully occupying any waste lands of the Crown in the said province, either by residing or by erecting any hut or building thereon, or by clearing, enclosing, or cultivating any part, or who may or shall knowingly make any false declaration with regard to commonages in hundreds, shall be liable, on the conviction thereof, to the penalties following, that is to say—For the first offence, a sum not exceeding £10, nor less than £5; for the second offence, a sum not exceeding £20, nor less than £10; and for a third or

any subsequent offence, a sum not exceeding £50, nor less than £20." But that clause is governed by Section 5 of Act No. 31 of 1872, "An Act to authorize the granting of Miscellaneous Leases of the Waste Lands of the Crown and for other purposes," and that section says—"Whenever in any Act heretofore made or passed, affecting the waste lands in the said province, any penalty is imposed for any offence committed on such waste lands, but no procedure is given for the recovery or enforcement thereof, every such penalty may be recovered . . . . . in a summary way before any Special Magistrate, or by two Justices of the Peace, under the provisions of Ordinance No. 6 of 1850." Then my learned friend says the information is bad because the lands occupied by the defendant were not waste lands of the Crown, on the ground of their having been leased for pastoral purposes. My learned friend, I presume, relies upon Act No. 5 of 1857, known as the Waste Lands Act, the 17th section of which says—"The words 'waste lands of the Crown' as used in this Act shall be held to comprise any land within the said province which now are or shall hereafter be vested in Her Majesty, her heirs and successors, and which has not been already granted, or lawfully contracted to be granted, to any person or persons in fee simple, or for an estate of freehold, or for a term of years, and which has not been dedicated or set apart for public use." The words for "a term of years" have been repealed by Section 2 of Act No. 11 of 1868-9. I have further to submit that the *certiorari* does not lie. By the Language of Acts Act, No. 9 of 1872, Section 28, it is provided—"Whenever by any Act any penalty shall be made recoverable before or authorized to be awarded by one or more Justices of the Peace, or they, or any of them, shall be empowered to hear, or determine, or to make an order, or to exercise any judicial function, such Act shall be taken to empower such Justices to adjudicate, order, and act therein accordingly, in a summary way, under the provisions of Act No. 6 of 1850, or any other Ordinance or Act for the time being in force for facilitating the performance of the duties of Justices of the Peace, in respect to summary convictions and orders; and to have enacted that no conviction, order, or judgment, made by any Justices under the authority of such

Ordinance or Act shall be void or quashed for want of form, or revokable by *certiorari*, or otherwise than as in the Ordinance or Act referred to is provided." The course provided by the Act is an appeal, and that I submit is the only course that can be adopted. (STOW, J.—But it must be shown that he was within the jurisdiction. He could not have been within his jurisdiction if the parties were not properly before the Court.) What I understand to be the difference between prohibition and *certiorari* is that the first issues when a Court has acted when it had not jurisdiction, and the latter only when a Court had jurisdiction but exceeds its power. I submit there ought not to be more than prohibition

J. W. Downer, in support of the rule.—That would be useless, as it would not recover the fine. (*Ingleby, Q.C.*—The fine has not been paid.) Yes; that is a matter of fact. (*Ingleby, Q.C.*—The Clerk of the Court states no action has been taken on the conviction.) A writ of *certiorari* will go even when the right is taken away by the Statute when a Court acted without its jurisdiction—

Paley on Convictions, 404.

HANSON, C.J.—We think the *certiorari* must go.

STOW, J.—On the ground of want of jurisdiction.

J. W. Downer.—Will your Honors add the words "Conviction quashed?"

STOW, J.—We cannot do that till we have the record.

HANSON, C.J.—It has been done here many times before. We can make an order that when the record arrives the conviction shall be considered quashed without a further motion.

STOW, J.—I have no objection to that if the parties consent.

Order accordingly.

HANSON, C.J., GWYNNE, J., STOW, J.] [COMMON LAW.

18 NOVEMBER, 1875.

GRAHAM v. THE DISTRICT COUNCIL OF SADDLEWORTH.

GENERAL DEMURRER.—Special.

A declaration against a District Council for damages occasioned through obstructions allowed to remain on a road stated that the road was under the care and management of the District Council, but did not aver that it was a "district road" within the meaning of the District Councils Act of 1858.

General demurrer on the ground of such non averment overruled.

Quære—Whether the objection would have held good on special demurrer?

GENERAL demurrer to declaration.

The declaration set out that the District Council of Saddleworth, having the care and management of a main road leading from the Saddleworth Railway Station to Clare, allowed certain heaps of dirt and rubbish to lie on the roadway, whereby the plaintiff's wagon was upset and the plaintiff injured.

The *Attorney-General (Way, Q.C.)*, and *Stuart*, for the defendants.—Under certain circumstances, and in particular manners—

Mersey Docks and Harbour Board Trustees v. *Gibbs*, L.R., 1 E. & J. App.. 93.

District Councils can be sued for injuries caused by a negligent performance of duties within their jurisdiction, but their liability does not extend to obstructions placed on roads outside their jurisdiction. To state an extreme case, the District Council of Saddleworth would not be answerable for obstructions they might cause in the streets of Adelaide. The road in question is not one that can be said to be under the care and management of the

District Council of Saddleworth. (STOW, J.—But the words "care and management" are surplusage.) Then, if it be so, the District Council are not liable as a corporate body. It cannot be said that this is a road which is under the management of the District Council. The declaration is bad, because it leaves an inference of law by assuming that this road is within their jurisdiction, instead of making a statement of facts. It does not say that it is a road over which they had control; it should have been shown that it came within the terms of the 103rd section of Act No. 10 of 1858.

Moulden, for the plaintiff, was not called on.

HANSON, C.J.—There is no doubt if this was a special demurrer, your objections would be of great force, and I should be inclined to go with you. But this is a general demurrer, and one, too, which must be overruled.

Demurrer overruled

HANSON, C.J., GWYNNE, J., STOW J.] [COMMON LAW.

19 NOVEMBER, 1875.

COMYN v. WILLSHIRE.

CORONER.—Power to Fine and Commit—Common Law Powers—Court of Record.

A Coroner in South Australia has all the common law powers of a Coroner in England; is entitled, when holding Court as Coroner, to fine for contempt and commit on default in payment, and is not liable to an action for such fine and committal.

Semble—*That a Coroner's Court is a Court of Record.*

RULE *nisi* for a new trial on the grounds—(1) that the plaintiff was improperly nonsuited; (2) that the Court presided over by the defendant was not a Court of record; (3) that even if it was, defendant did not act judicially or within the scope of his jurisdiction.

The action was false imprisonment.

The defendant acted as Coroner during an inquest at Georgetown, and during such inquest fined the plaintiff for contempt and committed him till payment of the fine. At the trial, the plaintiff was nonsuited, on the ground that the defendant was sitting as a Judge in a Court of Record, and as such was justified in so committing.

Smith now moved that the rule be made absolute.

The *Attorney-General (Way, Q.C.)*, and *J. W. Downer*, showed cause.—In England, Coroners' Courts are Courts of record—

Jervis on Coroners, 249.

A Judge of such Court has power to commit for contempt when committed in the face of the Court. (STOW, J.—To fine and commit in default of payment.) Perhaps that is the more correct

expression. In support of our proposition, we would refer to the celebrated case of

Hammond v. *Howell*, 2 Mod. R., 218,

arising out of the historical case of

Penn v. *Mead*,

in which it is decided that such an act is within the jurisdiction of a Court of record, and therefore no action will lie; and that the bringing the action was a greater offence than the contempt, as in principle it went against good government and justice. There are also the cases of

Thomas v. *Churton*, 31, L.J., Q.B., 139
Comyn's Digest Title Coroner A., 315
Rex v. *Clement*, 4 B. & A., 218
In re *Wallace*, L.R., 1 P.C., 283
Regina v. *Lefroy*, L.R., 8 Q.B., 134.

The latter was a County Court case. The cases seem to create a distinction between superior and inferior Courts of record. Superior Courts can punish whether the contempt be committed in the face of the Court or outside; inferior Courts can only punish in the first category. (STOW, J.—The last case quoted shows a Court created by Statute can only act upon the provisions of that Statute. I would direct your attention to that point, as it is the keystone of the argument of the other side.) The distinction we have pointed out, as to the powers of the superior and inferior Courts of record in regard to contempt, has led to the mistake that the Courts have no power to commit for contempt. Coroners, though they at one time in England had not such a power, now can fine for contempt—

Brittain, 9 and 10
Jervis on Coroners, 2nd Ed., 22; 3rd Ed., 254.

The 8th clause of the Coroners Act, No. 7 of 1850, which reserves to Coroners the powers already existing by law, is strong evidence that they were to be placed on the footing given by the common law to coroners in England. The coroners here are taken from Justices of Peace, and Lord TENTERDEN has clearly laid it down that when trying all matters on which they can pass a conviction, they are a Court of record—

Paley on Conviction, 157;

and though the decisions only give inferior Courts the position of Courts of record on criminal matters so far as contempt, still there is an opinion by a most respected Jurist that they have the same position regarding contempt on civil matters. A case was commenced by Sir Fletcher Norton, in his capacity of Attorney-General, against a Mr. Allmott for a paper he had written concerning the law of libel, and the case only dropped through the death of the Attorney-General. The case had gone so far as to induce Mr. Justice WILMOT to write out his opinions on which to base his judgment, and a perusal of it would show what a clear conviction he had on the subject—

Reg. v. *Allmott*, Wilmot's Opinions and Judgments, 254;

followed in

Sparkes v. *Marshall*, 2 Bing., N.C., 761.

If the power of punishing for contempt be denied a Coroner, how can he preserve order and decorum in his court? (STOW, J.—Would a Court under the Lands Clauses Consolidation Act be one of record?) We think it would be monstrous to argue otherwise—

Kemp v. *Neville*, 31 L.J., C.P., 158
Groenvelt v. *Burwell*, 1 Ray., 454.

The mere power to fine makes a Court one of record. A point has

been taken that the warrant had not been drawn up, but the plaintiff is debarred from questioning the mode or extent of procedure—

Kemp v. *Neville*, 31, L.J., C.P., 158.

(STOW, J.—Surely a man could be taken into custody while such a warrant was being drawn up?) The question whether the Court is one of record is quite immaterial. Every Court has power to commit for offences done in its face. The Coroners Act, No. 7 of 1850, did not create a Court. The Court came from England. All that Act provided was forms and regulations of procedure.

Smith, in support of the rule.—I admit coroners were imported from England, but not that the Coroner's Court has been brought here. All that is done is similar to what takes place in many other parts of the Empire. Of the two authorities quoted by the *Attorney-General* to show that a coroner can fine, one is only an opinion, and the other does not go so far as has been stated to the Court. Of course, if Coroner's Courts are Courts of record, I admit no action can be brought in respect of acts done within the jurisdiction of the Judge. If, however, he acts without his jurisdiction, an action will lie—

Houlden v. *Smith*, 19 L.J., Q.B., 170
Calder v. *Halket*, 3 Moore's P.C.C., 28,

in which a celebrated case, never authoritatively reported,

Taaffe v. *Downes*, 3 Moore, P.C.C., 36 N.,

is quoted. The latter case shows that even when a superior Court Judge exceeds his jurisdiction he renders himself liable to an action. At the trial, His Honor the Chief Justice asked whether a precedent could be shown for the action. Then I had none, but since then I have found

Foxhall v. *Barnett*, 23 L.J., N.S., Q.B., 7;

and I would refer the Court to the judgment of Lord CAMPBELL. Even admitting contempt was committed, under no circumstance can the Coroner be justified in the course he pursued. Time ought to have been given the present plaintiff in which to show cause why he should not be punished—

In re Pollard, L.R., 2 P.C., 106.

In so doing the Coroner went outside of his jurisdiction. (The *Attorney-General (Way, Q.C.).*—That point was not taken on the rule.) I am but answering your argument. He could fine him, but he had no right to put him, as he did, in a room and say he should not come out until he paid the fine. It is said that the Coroner derives his power under the 8th section, but that section, I contend, is confined in its operations to particular persons under particular circumstances. (STOW, J.—It is an ancillary power to fine jurymen. That does not take away the power to fine other persons.) The words of the clause will not bear such a construction. The power to fine is limited to what is said in that clause. (STOW, J.—I take it the clause was inserted to place the Coroners here and those in England on the same footing.) (HANSON, C.J.—Supposing that the Coroner simply made a mistake in the mode of procedure, and did more than the Act permitted in that direction, but yet kept within his jurisdiction, would he be liable for an action?) Possibly not. My contention, however, is that he has not the power to punish for contempt. (HANSON, C.J.—Then, how can he maintain order?) He may clear the Court. A Coroner's Court is not an open one—

Garnett v. *Farrand*, 6 B. & C., 611.

The fine is not really the fine of the Coroner, as it can only be enforced in the Local Court. My contention as to the power of the Coroner is well illustrated by Section 209 of the Local Court Act. (STOW, J.—That begs the question.) (GWYNNE, J.—Is not clause 8 an admission that the Coroner has all the common law authority he would have in England?) It limits it. (GWYNNE, J.

—Only in one specific fact; otherwise, it enlarges the powers.) All the clause does is to save those powers. (HANSON, C.J.—And that is a recognition of their right to use them.) There is no virtue in the word "Coroner." It simply means one who makes enquiries into matters. And further, Coroners' duties did not originate with enquiries into the cause of death. The Coroner's Court is one of the oldest Courts known to the law, and it has grown with the common law. It appears that at first they had simply to make enquiries into treasure trove. Then was added to their duties inquisitions of the deardem as regards deaths by misfortune, and last of all they were authorized to make inquisitions into all sorts of deaths. But that did not make them a Court of record. It was the Statute 4 Edward I., ch. 2, which enacted the keeping of rolls on parchment, which made them a Court of record. Can it be said that the Coroners' Courts here comply with that Statute? They have no Court and keep no records. Even the notes of evidence are not retained by them, but are forwarded to the Attorney-General. I, therefore, confidently submit that the Court in question was not one of record, and that the defendant, not being shielded by the protection of such Court, is liable to an action.

The *Attorney-General (Way, Q.C.)*, in reply.—The case

Foxhall v. *Barnett*, 23 L.J., Q.B., 7,

is inapplicable to the present case, as the want of jurisdiction was of a territorial character.

HANSON, C.J.—It appears to me that the rule must be discharged. I asked the learned counsel, when at the trial I directed that the plaintiff should be called and nonsuited, to point to any case where a Judge, sitting as such in a Court of record, had been held liable for an action for anything he then did. He then admitted that he had not been able to find one; and, it appears to me, that the case he has now produced is inapplicable, as there the Judge had as little jurisdiction as would any member of this Court who presumed to make decrees in any of the

neighbouring colonies. It appears that the defendant held a Court as Coroner, and that the plaintiff was fined and committed for contempt done in the face of the Court. Whether, if the Court had been applied to in a proper manner for a decision, he would have held the Coroner was right or wrong, is out of the question. The question is whether the act was done by a Judge in the exercise of his judicial functions, and, it appears to me, it was. On a true principle of law, I think the plaintiff is not entitled to succeed.

GWYNNE, J.—I was a good deal impressed with the argument of the learned counsel at the time he obtained this rule. I then felt some difficulty as to how far the common law of England applied to this Colony; but I must say now that the matter has been so fully argued my doubts are removed. It is well known, as a principle, that emigrants from England bring with them all the common and statute law of their fatherland, and that at once comes into force in the new country so far as is applicable to existing circumstances—The *Attorney-General* v. *Stuart*. Then comes the question—How is it to be determined what is applicable? That is done by the decisions of the Courts of the Colony and the expression of the opinion of the Legislature. That brings me up to the title of this Act. It clearly recognizes the existence of such an officer as a Coroner, which accords to my own actual experience of facts, and all that it does is to regulate the conduct of those who occupy the office. But though there is a Statute on the subject, that in no way detracts from or abridges the common law of England in force in the Colony, but rather augments the power of the Coroner. Having come to the conclusion that the Coroner here has at least the same, if not greater powers than he has in England, I shall concur in the judgment of the Chief Justice.

STOW, J.—Like His Honor the Primary Judge, I had some doubts on this matter when the rule was granted. I had some difficulty in determining how far we could apply established institutions of England to the circumstances of a new country. It

can never be that all the laws we bring with us can be applicable to our new country, but the great majority are, and this is one of the points on which they ought to be. A Coroner's Court is a most important one under any circumstances, and especially so in a new country; and, as I have already said, it is my opinion that the Legislature, by the way in which they worded clause 8 of this Act, intended that while they imposed a particular power on Coroners, they intended all the powers they then had by the common law of England to remain and continue. *Mr. Smith* has spoken of there being no Court, but it must be recollected that a Court is a Court even if it be held under a gum-tree. Even assuming for a moment that the mode of procedure was wrong, or that the punishment was excessive, I do not see that we should enquire into such matters. If the door to such enquiries were opened it would be injurious and dangerous, not only to the Judge, but to the administrator of justice. It would be very hard if for a mistake, while acting within his jurisdiction, he should be open to a claim for damages, the more especially when it is competent for this Court, if due cause be shown, to quash the order, or to make it of no avail. I do not know whether it be necessary for me to go into a consideration of the objects of the Act, further than to say that I think it, instead of limiting, increases the powers that Coroners then had by the common law of England. The argument on that part of the case does not commend itself to my reason, any more than it induces me to think that it was the intention of the Legislature when giving Justices of the Peace, when acting as coroners, express powers, and in no way to contract the powers they already held, or to create any new Court. Therefore, the common law power of Coroners still exists; and, on the whole, my opinion is the same as those of my learned colleagues, and I agree that the rule should be discharged.

Rule discharged.

HANSON, C.J., GWYNNE, J., STOW, J.] [COMMON LAW.

24 NOVEMBER, 1875.

HOWLETT v. PRIDMORE.

AGREEMENT.—Breach—Warranty of Title.

The plaintiff having obtained from the Commissioner of Crown Lands of Western Australia a letter stating that in accordance with the terms of arrangement the permission to work guano on a certain island, portion of the Western Australian Territory, would be transferred to him, entered into an agreement with the defendant whereby in consideration of the plaintiff depositing his right or royalty to work the island and assigning to him one-half of his (the plaintiff's) interest therein the defendant agreed to find vessels and capital for the purpose of bringing the guano to market, and also that a certain vessel expected to arrive in December, 1874, should be the first vessel dispatched. The purchase-money of this vessel was to be retained by the defendant out of the proceeds of sale of guano. This vessel instead of coming to Port Adelaide was sent to New Zealand.

Held—*That there was evidence to go to the jury, that the right or royalty referred to in the agreement was the letter above-mentioned and not a formal grant. And also evidence that the vessel was the property of the defendant, on whom the* onus *lay to show that its non-arrival was not caused by his acts.*

RULE *nisi* to set aside a nonsuit and have a new trial on the grounds that there was no evidence to go to the jury that the plaintiff was ready and willing to carry out his part of the contract, and that there had been a breach by the defendant.

The case was tried before the Chief Justice and a jury. The action was for £4,000 damages for breach of contract. The facts were as stated in the head-note.

Mann, Q.C., and *Stuart*, moved that the rule be made absolute.

The *Attorney-General (Way, Q.C.)* showed cause. In all agreements for the sale or transfer of any particular interest there must be both an implied and an express warranty of title. This agreement requires us to do something which would in law be a

trespass. The plaintiff assigned us his rights, but he has never given us the title, nor is he in a position to give us a title, which will entitle us to go on the island, and so carry out the subject-matter of the agreement. The contract, it will be seen, is an executory one. It was agreed that this document, which he calls his title, was to be deposited on a certain date. That was not done; but though that is a breach of contract on the part of the plaintiff, it is not one that entitled the defendant to cancel the agreement on the ground that it was not a condition precedent to the agreement, but an independent stipulation. But there is a condition precedent to the agreement, and that is the deposit of the right or royalty itself. (STOW, J.—What does "right or royalty" mean?) It is quite clear the agreement is not to be read "right or royalty which has been deposited." That is the argument on the other side, but the result of its acceptance means a declaration that the agreement is senseless and contradictory. This agreement was a sale of realty, and when that is done there is always a warranty of title. When a man sells a chattel he is not supposed to do this, but there are so many exceptions that they almost eat up the rules. (STOW, J.—Is not this the sale of a right which is to form the basis of the title to the island?) (GWYNNE, J.—As there is no imputation of fraud it resolves itself into this—the plaintiff exhibited what he had to sell, and the defendant, in the exercise of his judgment, bought it.) It was not produced, certainly not at the time the agreement was signed; the letter even at the best only shows that there were negotiations to obtain the right. The other side rely upon the patent cases, in which though false rights have formed the basis of contracts, those contracts have not been rescinded. But that was simply on the ground that what was done was to sell the letters patent, but not in any way to warrant that they were valuable. But here the plaintiff had not even the right. (STOW, J.—Constructively he has.) That is only the contention of the other side, who read the document in the past tense. (STOW, J.—In a matter of this sort it would be absurd to say they were to wait until they got a complete title.) (GWYNNE, J.—This agreement is signed by the defendant, therefore it must be taken to be an

expression in his own language of what were his intentions.) If the defendant signed this agreement under a misapprehension, he would not be liable on this action—

Hall v. *Conder*, 2 C.B., N.S., 53.

That is a natural construction to put on this case. The plaintiff shows him as to-day a letter which shows that he is in negotiation for a certain thing and that he has a fair prospect of obtaining his ends. A fortnight after, when they met, naturally inferring from his conduct that he had succeeded, this agreement was signed. All the cases cited by the other side are ones in which it did not lie in the mouth of the defendant to contest the plaintiff's claim, as they had for years employed the benefit of that for which they at last refused to pay. But here the plaintiff had not a proper grant. (STOW, J.—That is not pleaded.) (GWYNNE, J.—You do not say that the title was invalid and conferred no power whatever.) Perhaps not technically, but we are entitled to take the point under the plea of readiness and willingness. The contention of the other side is that the defendant is bound to send a ship, even if he obtains notice from the Western Australian Government that he will be met on landing by a whole *posse* of Custom-House officers and policemen, who would prevent him from taking a bushel of guano, and for the sake of carrying out this contract perhaps let himself in for a criminal prosecution, and certainly render himself liable to an action in damages for trespass. Surely the Court will not place a construction on an agreement which will enforce us doing a wrongful action? (STOW, J.—I do not see how you can bring that within the pleadings.) We should have been entitled to ask for a nonsuit on the ground of *non-assumpsit*. (STOW, J.—But the Judge would have made an amendment in favour of the plaintiff if his attention had been called to the point.) And if so, we should have been entitled to an amendment to enable us to take the point as to the title. Then, as regards the breach, I very confidently submit there has been none committed. The promise to send the ship early in December was simply the result of expectation, and did not

amount to more than a representation. The plaintiff ought by his pleadings, if he wished to sustain an action, to have alleged that she was expected so to arrive. (STOW, J.—If anything was done on that expectation there would be a breach.) (GWYNNE, J.—There was a warranty that she would proceed from Mauritius to Port Adelaide, and that she should then as soon as possible proceed to the island.) There is no absolute warranty. There is no evidence to show that the defendant did anything to prevent the vessel coming here. There was no evidence that the deviation to New Zealand was caused by the defendant. It was just as possible that it was caused from stress of weather, or because the vessel was chartered to go there at a date prior to that on which the captain could have been informed of the agreement. (STOW, J.—That is immaterial. There is an express warranty a certain thing shall be done.) The construction I put on this part of the agreement is supported by the cases in the book—

Corkling v. *Massey*, 28 L.T., N.S., 636.

The plaintiff should have made an allegation of failure on our part. (GWYNNE, J.—Would not the burden of proof that the defendant had nothing to do with the deviation lie with you?) No, because the plaintiff says we have done a wrong by sending the vessel somewhere else. There is nothing to show that the defendant had any interest in the ship. Indeed, the contract goes to the contrary, for it says the parties may buy the ship. (STOW, J.—There is a fact from which the jury might infer it belonged to the defendant. The price of the ship was to be retained out of the proceeds.) The case of *Olive* v. *Booker*, 1 Ex., 416, cited by the other side, does not apply, as that deals with an existing fact, whereas here there was something to be done. It has been clearly decided that contracts made as regards non-existing things have no force—

Hastie v. *Couturier*, 22 L.J., Ex., 299
On appeal, 25 L.J., Ex., 253.

(STOW, J.—There would be force in that if you could show at the

time the contract was made Browse Island was submerged.) It was so far as the legal rights of the parties were concerned.

Bundey, on the same side.—The letters clearly show that the plaintiff intended to do something more as regards the title. The letter of the Commissioner of Crown Lands was simply a parol licence revocable at pleasure.

Mann (Q.C.), and *Stuart*, in support of the rule.—The letters were known of prior to the contract. It is the latter which governs the parties. The whole question is what is the meaning of "right or royalty."

HANSON, C.J.—You need not proceed, *Mr. Mann*. The majority of the Court are of opinion that there was evidence to go to the jury. They are of opinion that there is evidence in support of the proposition that the parties intended to recognize the letter shown to the defendant as to the right or royalty referred to in the agreement. They are of opinion also that the non-arrival of the ship here was caused by the acts of defendant, or by some person responsible to him for his acts. Though at present not able to share in their conclusions, I can see no objection to the course they think should be adopted, for the Court will then be put in possession of all the facts, and better able to understand the points of law that may be raised.

Rule absolute.

HANSON, C.J., GWYNNE, J., STOW, J.] [COMMON LAW.

9 DECEMBER, 1875.

JONES v. SCOTT.

COMPANY.—Principal—Agent—Onus probandi.

The defendant, being Secretary to the Yam Creek Gold Mining Company, telegraphed the plaintiff to wind up the affairs of the Company.

There was subsequent correspondence between the parties, the plaintiff sometimes addressing the defendant personally, at others as Secretary to the Company; and the account was opened in the books of the plaintiff in the name of the Company.

There was no evidence that the defendant had not authority so to employ the plaintiff on behalf of the Company.

Held—*That the defendant was not personally liable.*

That the onus *of proving that the defendant had not authority rested on the plaintiff.*

RULE *nisi* for a new trial on the ground that the defendant personally engaged the plaintiff, and that the defendant had committed a breach of an implied warranty that he was making a contract binding on the Company.

The defendant, who is the Secretary of various mining companies, and resident in Adelaide, had by telegram instructed the plaintiff, a member of the firm of Abbott & Jones, agents, at Palmerston, to wind up the affairs of the Yam Creek Gold Mining Company at Pine and Howley Creeks. The telegram stated that, if necessary, plaintiff might employ a man named Nelson, who had been manager of the claims, to assist him in carrying out his instructions. Plaintiff accepted the agency, and out of it correspondence arose. Some of the letters were addressed to the defendant in his individual capacity, and others in his character as Secretary of the Yam Creek Gold Mining Company. The accounts of the agency were kept as Abbott & Jones in account with the Yam Creek Gold Mining Company. Nelson obtained a verdict in the Local Court at Palmerston against Jones for wages for the sum

of £64, a portion of which Jones had paid so as to get the bailiffs out of his house; £15 had been paid to Jones for his agency in this matter by Scott. Jones brought an action in the Local Court of Adelaide against Scott to recover money spent at defendant's request, and for damages to his credit; but he was nonsuited by the Special Magistrate, on the ground that he had always treated the Company as his principal.

Sheridan.—I appear to show cause against the rule.

HANSON, C.J.—The Court will not call upon you for an argument.

Smith, in support of the rule.—The defendant, I submit, is liable on two grounds:—1. He engaged the plaintiff personally to do work for himself; and if the Court be against me on that point, 2.—Because he has committed a breach of an implied warranty that he was making a binding contract on the Company to pay the plaintiff for his work. In the telegram in which Scott proposes the agency, he says nothing about the Company. It is said that in some of the letters that have passed in reference to the agency the plaintiff has recognized the Company by writing to the defendant as its Secretary; but I submit that such an act simply amounted to a matter of description, and that in calling him Secretary to the Company, he was merely earmarking his business, and it is clear from the 61st section of the Companies Act that by so doing he would not recognize the Company as his principal. Even assuming for the sake of argument that he did at any time intend to deal with the Company, it would not alter the liability of the defendant, the latter having failed to give the plaintiff a right of action by a valid claim against the Company. It is said the account shows plaintiff treated the Company as his principal. I venture to submit it proves nothing of the sort. In the first place, it was part of the duty of the agency that the accounts should be properly kept. In the next place, this was not the only Company for which Jones at the request of Scott was acting as agent. It was necessary that the

accounts should be kept in this manner so that both parties might properly regulate their businesses. The accounts do not contain the item of £15 commission which Jones has been paid by Scott, nor the claim of Nelson for his wages. And the directing the accounts in this manner is not an election of the Company as his principal. The election can only be by the prosecution of a claim up to judgment. Then, too, Scott has adopted and ratified what Jones did. Without such a ratification on the part of the Company, we could not bring an action. There is no proof that they ever authorized what was done, or that they have ever adopted and ratified the acts of Jones. The Company, according to the 45th section of the Act, can only be liable for work ordered "for and on their behalf." Neither of those requisites could be satisfied in an action brought against the Company, and to say that an action will not lie against the party ordering the work is to give a charter to obtain goods, labour, and I know not what, for nothing. And referring once more to the point, that plaintiff adopted the Company as his principal by addressing defendant as its Secretary, I would point out that such an act was no recognition of the Company. The Companies Act recognises no such officer as a Secretary, so that to address Mr. Scott as Secretary was simply paying him a compliment. Mr. Scott would be but in the same position as Mr. Jones. He would be an agent. (GWYNNE, J.—Would not the relation be that of master and servant?) That is not clear. Every servant is an agent, but every agent is not a servant. A man, to be a servant, must give his whole time to his employer. In one sense a banker is the servant of every one of his customers; but he is not so in the sense of the Masters and Servants Act. (GWYNNE, J.—Perhaps not in that sense. Could an articled clerk doing copy in the evening for another lawyer be deemed other than the servant of his regular employer?) No; because that would be work not done in the time of his master. But I venture to submit as a further proposition, that even if this telegram had said nothing about Nelson being employed, Jones, if he had found it necessary for the execution of the agency, could have employed him. (GWYNNE, J.—The telegram restricts assistance to the time of sale.) Certainly not. There could have been no sale without a collection

of the goods, which were scattered about over sixty miles of country, which country would have to be traversed at least a dozen times before the things could be collected. Applying the admitted law to the facts, I would submit that even if your Honors are of opinion it was the Company who gave the instructions, then the defendant is liable on the second point—the breach of warranty—

Story on Agencies, sections 264 and 277
Cherry v. *the Colonial Bank of Australasia*, L.R., 3 P.C., 24
Betts v. *Gibbins*, 2 Ad. & Ell., 57
Weeks v. *Propert*, L.R., 8 C.P., 427.

All I am now asking for is not a decision on the merits, but an order for a new trial, as I venture to submit that the case was not allowed to go far enough to enable the Court below to come to a correct conclusion. It may have been, as is sometimes the case, that Scott was farming the Company, and if that were so, then he would be liable. If he were not liable, why should he have paid a portion of the items in respect of which the plaintiff claims? (GWYNNE, J.—We cannot go by inference. When a party makes an averment in a declaration, he must prove its accuracy by evidence.) And we have given the proof. (GWYNNE, J.—Where?) By the Statute itself. (GWYNNE, J.—But the clause is for the protection of the Company.) Yes. Things must be done for and on its behalf. (HANSON, C.J.—Then a man could not recover wages unless expressly employed by the Company.) Small matters may be done by officials. But this is not a small matter. It is the scattering to the wind of the whole means of the Company to carry on its business. (STOW, J.—Cannot authorisation be given by conduct as well as words?) Certainly the conduct of Scott has been to lead the plaintiff to suppose that he was his employer.

HANSON, C.J.—It appears to me that this rule must be discharged. The plaintiff comes here with two contentions. The first is that the telegram sent by the defendant was an authority on the part of the defendant to the plaintiff to act and to employ assistance, and that it was an implied contract on the part of

Scott to pay for the same. The second contention—contingent on the Court thinking that such is not the case—is that Scott made an expressed contract for and on behalf of the Company, and by failing to put the plaintiff in a position to bring an action has committed a breach of warranty. The first contention is disproved by the evidence. It is quite clear that all that Jones did was for the benefit of the Company, and not for the benefit of Scott. If it could be proved that Scott had obtained the Company into his own hands, and that what was realized by the sale of the property would go into his pocket, then there would have been some ground for the argument which has been addressed to the Court. All that was to be done was to be for and on behalf of the Company, and there is nothing to show an express authority which would render Scott individually liable for anything the plaintiff might do under the contract. The contract was to work for a Company, of which it was well known defendant was a servant, and the aspect of the case is not in any way affected by the fact that the plaintiff, in pursuance of his agency, made a contract in such a manner that he could be sued personally. Then, as regards the second point, it is a necessary averment to a statement that Scott professed to be authorized to give authority in the name and for and on behalf of the Company, and that he had no such power. That should have been proved. No proof whatever has been tendered that he was not so authorized, and that branch of the case, therefore, fails. On both grounds, I am of opinion that the rule must be discharged.

GWYNNE, J.—I concur. There are good grounds for the decision.

STOW, J.—I concur also. As regards the second point raised by the plaintiff, that the *onus probandi* was on the defendant to show he was authorized, I must say that it is quite contrary to my own ideas, and I think it cannot be the law. Suppose I sue on the warranty of a horse, is it sufficient for me to prove the warranty and then call upon the other side to prove that the horse is sound? The rule on both grounds must be discharged.

Rule discharged.

HANSON, C.J., GWYNNE, J., WEARING, J.] [COMMON LAW.

1, 2, 10, AND 17 DECEMBER, 1875.

MURRAY v. ACRAMAN.

INSOLVENT ACT, 1860.—*Trover—Payment—Order and disposition—Custom of Warehousemen.*

A purchased from the plaintiffs thirty bales of cornsacks—the purchase-money being paid by three bills of exchange, payable at different dates—and stored them in his name in a free warehouse at Port Adelaide. Subsequently, being unable to meet the first bill at maturity, A handed the plaintiffs the storage receipt for the cornsacks as security, and made a similar arrangement as regards the second bill. Before the third bill became due, A—being then in insolvent circumstances—arranged that the plaintiff should take back the cornsacks, and the original sale be rescinded.

The third bill was then in the hands of the plaintiffs' bankers for discount; and the plaintiffs, accordingly, before the bill became due, instructed their bankers to pass the amount to their debit, which was accordingly done, the plaintiffs' account being at the time overdrawn.

Shortly after this arrangement A made an assignment under Division VI. of the Insolvent Act, 1860, of his estate and effects to the defendants as trustees, for the benefit of his creditors, and the cornsacks still remaining in the warehouse in A's name were taken possession of by the defendants.

On action for the value of the cornsacks, evidence was given of a custom existing in free warehouses at Port Adelaide to hand the goods named in their storage receipt to the holder of such receipt; and the jury found a usage as regards goods stored in such warehouses that they should be sold without notice to the warehouseman.

Held—GWYNNE, J., dissentiente—*That there was a payment within the statute.*

That the goods were not, at the date of the assignment, in the order and disposition of A.

That the finding of the jury was not against the weight of evidence.

Quære—*Whether the order and disposition clauses of the Insolvent Act, 1860, apply to deeds of assignment?*

Per STOW, J.—*The custom established as regards goods of other persons in warehouses to take them out of the order and disposition*

of the insolvent in whose name they stand, must be the custom of the place where the goods are stored—not of the insolvent, nor of the place where his business is carried on.

RULE *nisi* on behalf of the plaintiff for a new trial, on the ground of misdirection.

The plaintiffs were Messrs. D. & W. Murray; the defendants were the Trustees, under a deed of assignment made in pursuance of Division VI. of the Insolvent Act, 1860, of Richard Allen, jun. Allen had purchased from the plaintiffs thirty bales cornsacks, in payment giving three bills of exchange, payable at different dates.

The sacks were stored by Allen in his own name in the free warehouse at Port Adelaide of Messrs. R. & R. Main.

Allen, being unable to meet the first bill, requested the plaintiffs to renew the same, which they did on his handing to them as security the storage receipt for the cornsacks.

The second bill was also renewed on similar terms.

Before the third bill became due, Allen requested the plaintiffs to take back the cornsacks, and release him from the bills, which they agreed to do.

The third bill was then under discount at the plaintiffs' bankers; but the plaintiffs, before maturity of the bill, instructed their bankers to pass the amount of the bill to their debit, which was accordingly done. The plaintiffs' account was then overdrawn.

At the trial, STOW, J., asked the jury—1. Whether the plaintiffs satisfied the English, Scottish, and Australian Chartered Bank as regards the bills? and—2. Whether it was a usage of trade for persons to deal in stored goods without giving notice to the warehousemen? The jury answered both questions in the affirmative. STOW, J., then directed a verdict for the defendants, on the ground that the facts found did not touch the question of reputed ownership.

Way (Q.C.) now moved that the rule be made absolute.

Thrupp, and *J. W. Downer*, showed cause.—The plaintiffs did nothing which can take this contract between them and Allen out of the Statute of Frauds, and the goods were in the order and disposition of Allen at the time he made his deed of assignment. The jury found that the plaintiffs satisfied their bankers on these bills; but what is the evidence? It is shown that the payment consisted in simply debiting the plaintiffs with the amount in the bank books. That was at a time, too, when the plaintiffs' account was heavily overdrawn. It is shown that the account was not at a credit until a date subsequent to that at which Allen made his deed of assignment. It is shown that Allen was not informed that the bills were under discount, and, therefore, anything which passed in his mind at the time this arrangement was made could not have any reference to any duty he supposed the plaintiff might have to perform. Not being informed of this circumstance, how could he ask the plaintiffs to retire the bills? How could he do more than request to be entirely relieved of his liability on these bills? To support the contention of payment the plaintiffs must prove not only that the bills were actually paid or satisfied, but also that that was done for and on behalf of the acceptor, and not on their own account. Endorsement, as contended by the defendants, is all that was done. If they simply satisfied the bills as endorsers they would have done nothing to benefit the acceptor, for he would still be liable to be sued by the bankers on the debit items being cancelled by the consent of plaintiffs. What was done was simply an agreement with the Bank to be answerable for the debt of another. Such an agreement ought to have been in writing; and not being so it fails to satisfy the Statute of Frauds. I fail to understand with what object the cases that have been mentioned by the other side as bearing on this point are to be put before the Court.

Field v. *Carr*, 5 Bingham, 13,

cannot apply, because the plaintiffs' account was not at a credit before the date of Allen's deed.

Belshaw v. *Bush*, 11 C.B., 191,

cannot in any way apply. In that case, the plaintiff had given a bill in satisfaction of a debt; it was discounted, and he was sued while it was still current. That was not a feature of the present case.

Atkins v. *Owen*, 4 N. & M., 123,

does not apply, because no credit has been given by the persons ultimately liable—

Vide judgment of Mr. Justice PATTERSON.
Pollard v. *the Bank of England*, L.R., 6 Q.B., 623,

was a case in which there was no question that there had been an actual payment. In the present case there has been no such ratification, and Allen, therefore, could be sued on the bills.

Pollard v. *Ogden*, 22 L.J., Q.B., 439,

is subject to former remarks. I do not refer to

Jones v. *Broadhurst*, 9 C.B., 173,

because I have not been able to find the book; but I have a case here,

Randall v. *Moon*, 12 C.B., 261.

(HANSON, C.J.—That case turns simply on a question of pleading.) There is also

Williams v. *James*, 19 L.J., Q.B., 445,

which proves that if a bill remains in the hands of the Bank, as it did in this case, the Bank, at the request of and as trustees for the plaintiffs, could have sued Allen on the bills. Mr. Spence said in his evidence he would only have given the bills up to the Murrays.

That clearly shows that he did not hold them for the benefit of Allen. (GWYNNE, J.—Your contention is that none of this transaction amounted to a payment under the Statute of Frauds?) Yes—

Byles on Bills, 9th ed., 214, 215; 10th ed., 220 to 222.

If the plaintiffs became bankrupt, and the bills were still in the hands of the Bank, would not Mr. Allen be served with a writ and sued on an action to which he would have no defence? How, then, can it be said this transaction was for and on behalf of Allen? I now come to the question of reputed ownership. And first, I will take the question whether it affects trust-deeds. The 180th clause in our Local Insolvent Act is virtually a transcript of the 197th clause of the English Act of 1861, and, therefore, any decision on that clause will apply to the 180th clause. I would call attention first to some of the clauses in our own Act. The 179th clause shows that trustees may recover the estate in their own name just as if they were assignees. The 181st clause provides that creditors shall have the same rights under such deeds as if the estate was in the Court, and their rights are not to be prejudiced by their being parties to the deed. The 184th clause gives the trustees the same power as assignees have to cause the debtor to be examined. Clause 18 of the Amending Act, No. 3 of 1870, lays it down that the estate and effects of the debtor shall be deemed to be those which he sets out in the schedule of the deed. All these clauses show that the object of the Legislature was to put trustees in the same position as assignees. Then I would call attention to the 100th clause of the Insolvency Act, known as the vesting clause. (GWYNNE, J.—That only governs property in which the debtor has both an equitable and a legal right. It would be absurd to say that a person could possess the goods of other persons in his occupation as owner.) The 82nd and other sections show that property over which the debtor believes he has no control, over which, if he remained solvent, he could exercise no rights, can, under the general policy of the Insolvency Law, be made available for

distribution among the creditors. (GWYNNE, J.—That simply introduces the doctrine of apparent possession.) The 82nd clause deals with reputed possession. The 83rd relates to voluntary conveyances. (GWYNNE, J.—Without that, the trustees could not take more than the debtor.) That is so. The 82nd and following clauses must be read in conjunction with the 162nd and 163rd clauses, which are known as the dividend clauses. (GWYNNE, J.—Has the Commissioner a right to order a dividend when a man is not before him as an insolvent?) Yes, by virtue of the 180th section. Besides, the making such a deed is an act of bankruptcy. Now, I am free to admit that though this point has been raised in argument in cases in England, I can find no decision as to whether or not the doctrine of reputed ownership applies to trust-deeds. It will, therefore, be necessary to arrive at a decision on this point to reason by analogy. I have already pointed out the effect of the 82nd and 83rd sections of the Act. The 85th section refers to goods under seizure by the Sheriff, and says that the Court may order the property to be given up for the purpose of division among the creditors. The 89th section refers to fraudulent preferences, and the 90th to mortgages within sixty days. It will thus be seen that the whole object of the Act is to swell as much as possible the estate of the debtor for the benefit of his creditors. I will admit that, but for the 180th clause, the Commissioner could not make a dividend order, and even with the assistance of the 180th clause, he cannot make an order for allowance—

Ex parte *Gibbins*, 34 L.J., Bank., 39.

That is, because the allowance depends upon the conduct of the debtor and the certificate he obtains, and these are both matters about which nothing can be ascertained under a trust-deed. Now, this question as to reputed ownership affecting trust-deeds is mentioned in

Webb v. *Whisney*, 18 L.T., N.S., 524,

by *Mr. Huddlestone*, one of the counsel, who, though he says

that the point has never been taken, does not say that it cannot be taken; and the Judges, because the point was not material to their decision on the case, avoided giving any opinion upon the question. The same course was followed in

Ex parte *Holland*, 19 L.T., N.S., 430,

though I must say that what appears in that case is rather in my favour. There are numerous cases in which the Judges of England have shown an anxious desire to lean to the view that trustees have the same power as assignees, and that the object of the Legislature was to make the estate of the debtor as large as possible—

In re *Penton*, L.R., 1 Chan. App., 158
Exley v. *Inglis*, L.R., 3 Ex., 247
Petty v. *Cooke*, L.R., 6 Q.B., 790
Topping v. *Keysell*, 33 L.J., C.P., 225
Porter v. *Kirkus*, L.R., 2 C.P., 590
Williams v. *Cadbury*, *ibid*, 453
Wood v. *Dunn*, L.R., 2 Q.B., 73
Ex parte *Alexander*, 32 L.J., Bank., 55
Stanger v. *Miller*, L.R., 1 Ex., 58
Ex parte *Lawrence*, 32 L.J., Bank., 61
Griffiths and Holmes's Bankruptcy, Vol. 2, 1033 to 1035.

Cur. ad. vult.

2 December—

Thrupp and *J. W. Downer*, in continuation.—The custom set up by the plaintiff is no answer to our allegation that the goods were in the reputed ownership of Allen at the time of his execution of the deed. The usage proved must be that of a particular trade; the particular trade must be that of the bankrupt; and that should be so notorious that it should be known to all who have dealings or who are likely to trade with the bankrupt—

Smith's Mercantile Law, 700.

The Statute set up altogether fails to satisfy either of these three requirements. The evidence on the custom was not confined to one class of goods—such as cornsacks, which were the goods forming the basis of the dispute—nor of any particular trade. Indeed, all the evidence as to usage was irrelevant, as it was led on the supposition of what would be done with such orders, provided a warehousekeeper was insolvent. (GWYNNE, J.—According to the evidence, the custom had a territorial qualification.) Yes; it was said to be confined to Port Adelaide. Even then, the evidence was not unanimous as to the nature of the custom.

Watson v. *Peache*, 1 Bing. N. C. 327,

cited by the other side, does not apply, as it decides that when a custom of trade is notorious in the district in which a man becomes bankrupt it is not necessary to prove it to be notorious to the whole world. Can it be supposed that the insolvent's creditors at Port Victor would know of a custom said to be confined to Port Adelaide? (STOW, J.—They would hardly even know that the goods were there.) Then there is

Horn v. *Baker*, 9 East, 215
Smith's Leading Cases, vol. 2, 190, 6th Ed.

That does not apply, as the usage dealt with in the case is totally different to the one set up here. That usage was one which belonged to the trade of the insolvent.

Storer v. *Hunter*, 3 B. & C., 368,

does not apply, as besides a usage being proved it was shown that the landlord had resumed possession of the colliery the day before the execution of the deed. Then

Hamilton v. *Bell*, 10 Ex., 545,

cannot apply to this matter. It is, as your Honors know, the

clockmaker's case, and deals with the absurdity of assuming that a watchmaker must be the reputed owner of every watch or clock in his shop, owing to the fact that such articles are constantly left to such tradesmen for repair. The case of

Zwinger v. *Samuda*, 1 Moore, 12,

cannot apply. It also deals with a speciality, namely, the power to pass West India dock warrants, being held equivalent in their power of passing property as bills of lading.

Ackard v. *Ring*, 31 L.J., N.S., 647,

is a distinct authority in our favour. Lord Chief Justice COCKBURN there lays it down that to prove a practice you must do something more than bring a number of people to express a belief that it exists.

Ex parte *Harrison*, 3 Mont. & Ayr, 506,

proves the shares cannot be transferred without the sanction of the Directors, but the notice of an assignment given to a Managing Director will be deemed official notice to a Company.

Ex parte *Agra Bank*, L.R., 3 Ch., 555,

distinctly asserts that a casual notice given, say in the form of a conversation, is not sufficient.

Ex parte *Richardson*, 3 Deac. & Chit., 244,

must have been cited because of the marginal note, which says a casual conversation will be sufficient. A perusal of the facts shows that the decision says nothing of the sort. (STOW, J.—Those cases only apply to agents. Do they say that a principal cannot receive notice in a casual manner?) If such be the doctrine, there would be no end to an intolerable nuisance.

Priestly v. *Pratt*, L.R., 2 Ex., 101,

refers to a notorious custom with reference to farm stock, and so notorious that the jury, on evidence being tendered as to the custom, said it was unnecessary, as they knew all about it.

Ex parte *Ward* in re *Couston*, L.R., 8 Ch., 144,

was an authority in favour of defendants, as it showed that it was only by the express exception of the true owner that the property did not pass to the assignees.

Reynolds v. *Bowley*, L.R., 2 Ex., 474,

was decided under peculiar circumstances, and the decision—that the goods of a dormant partner did not pass to the assignees of the ostensible partner—was given to prevent a hardship being inflicted on a woman.

Acraman v. *Bates*, 29 L.J., Q.B., 78,

on the question of reputed ownership, is another case which does not apply, because of its special circumstances. There, the insolvent had done all that was in his power to put the goods out of his possession, order, or disposition. Then

Guan v. *Bolckow*, 32 L.T., 781,

was cited, which will not bear the interpretation that the transfer of the delivery order by the owner might pass the goods.

Goodwin v. *Robarts*, L.R., 10 Ex., 76,

is a decision upon a foreign contract according to the law of the country in which it was made and operated. It has been decided that such, however, is not the law of England—

Crouch v. *The Credit Foncier Company*,
Lacon v. *Liffen*, 4 Giff., 75,

quoted by the *Attorney-General*, cannot in any way apply. It is a case under the Shipping Act, and decided upon the provision of the law that property must be transferred by endorsement. It has been held that insurance policies cannot be assigned without notice, and that the fact of the policy being in the hands of a third party does not prevent dealings with the principal; also, that the Company requiring no notice does not render it unnecessary to give one—

Ex parte *Patch*, 7 Jurist, 820
Ex parte *Tennyson*, 1 Mont. & Bligh, 67
Ex parte *Price*, 3 Montague, Deacon, and De Gex, 580.

Judge STORY has expressed very strongly his objection to the growing practice of allowing loosely-proved usages of trade being allowed to contravene not merely the general, but also the commercial law, and he rejoices that the Courts have now set their faces against the practice, and will not allow it to be extended—

Taylor on Evidence, 1005.

The usage must be that of a particular trade—

In re *Wallworth*, 26 L.J., Bankruptcy, 61
Lingham v. *Biggs*, 1 Bos. & Pull., 82.

The holding of the delivery notes does not give the right of action—

Dixon v. *Bovill*, 2 Jurist, N.S., 933.

Property cannot be passed from hand to hand by the transfer of the delivery-notes—*(Ibid.)*. The usage must belong to the trade of the bankrupt—

Ex parte *Ward* in re *Couston*, L.R., 8 Ch., 144,
Ex parte *Watkins*, 1 Dea., 131; 2 Mont. & A., 348.

In both these cases, the custom had existed for fifty years, and was known to all the parties with whom the insolvent had had dealings. The agreement between Allen and Gordon must have

been based on the supposition that Murrays had the bills. At any rate, a presumption that they had power over them would be raised by the fact that two of them were renewed. That such was the presumption is strengthened by the fact that he gave security for the renewals. Then, it is said that Murrays paid these bills because they were placed to their debit. But does that mean payment? It appears that the Murrays could have what advances they wanted, and that one means of doing this was by debiting bills. That simply means that they were credited with the amount of the bills, less the discount, and all the effect it has is to lessen the amount of interest payable on the overdraft. There is no evidence Allen ever made Gordon his agent to pay the bills. (HANSON, C.J.—The word "retire" was used. Might not the jury infer from that that he did instruct Gordon, and that he knew the bills had been discounted?) There is no evidence that was said. In his examination-in-chief he gives the arrangement, and it is only in cross-examination, when asked his opinion as to the effect of the arrangement, that he uses the word "retire." In point of fact, there was no payment, and no circumstance occurred which could support a plea of payment if an action on the bills were brought by the Bank. Allen certainly could not plead payment. Could Murrays even plead payment? If their account went to a credit to satisfy every liability, then payment might be pleaded; but it was not so, and it was not so for some time after the bills were debited. All that was done between Murrays and the Bank comes to this, that they got the bills debited one day earlier than they would if the usual course of business had been followed. It is clear that the Bank simply acted as endorsers, and not as acceptors. As your Honors know, a special defence of exoneration and discharge and waiver is allowed upon actions on bills of exchange. Such an exoneration must, however, be express. Here, however, if there has been an exoneration, it is only implied. (GWYNNE, J.—If Murrays had brought an action on these bills, could Allen have made any defence? Could he have pleaded payment?) I think not. All that

Field. v *Carr*, 5 Bing., 13,

decides is the order in which a man shall meet various liabilities held against him by his banker.

Jones v. *Broadhurst*, 9 C.B., 173,

quoted by the other side, decides that the payment by the drawer does not prevent an action against the acceptor; so that on the decision in that case, what Murrays did still left Allen liable. The evidence of both Mr. Gordon and Mr. Spence goes no further than to show that a certain course of business was carried on between them, and that that was based on the faith which Mr. Spence had in the solvency of the plaintiffs.

Webb v. *Whinney*, 18 L.T., N.S., 524,

is a distinct authority that the contract under which the trustees act is not confined to the four corners of the deed. In other words, that they have the power conferred by the deed plus the powers conferred by Statute. But for a slight modification in the later Statutes, there could have been no argument on the other side. From the 26th James I. to the 6th George IV. the assignees had power to take the property of the debtor without obtaining any order from the Court. Under the English law, there are two classes of deeds executed by insolvents. There is an inspectorship deed, which is virtually a composition deed; and there is also a deed known as Schedule D deed, which is to meet cases in which it is impossible, from ignorance as to the holders of bills and so on, to get at all the creditors, and which is binding if executed by three-fourths of the creditors in number and value; but the decision in

Ex parte *Wilmott*, L.R., 2 Ch. App., 875; 16 L.T., N.S., 650

removes all doubts as to whether the provisions of insolvency do not apply to trust-deeds as well as to adjudications in bankruptcy. The other side may argue that property to pass must be property that the insolvent could name in his schedule. (STOW, J.—I don't

think that can be argued.) But it may be said that he could not include property which was not his at the time of insolvency. (GWYNNE, J.—It never was his practically. There can be no pretence that it was.) According to the policy of the law, it would be part of his assets in bankruptcy. And then, what do

Ex parte *Watkins*, 1 Dea, 131; 2 Mont. & A., 348,

and

Ex parte *Ward*, in re *Couston*, L.R., 8 Ch., 520,

decide? They show most distinctly that the custom must be that of the insolvent, and that it must be known in the place in which the insolvent has carried on business. It is also equally clear that, supposing the creditors did not know the goods were there, no harm could be done, as the insolvent would get no credit on them; and on the other hand, if they did know they were there, he would also get no credit, for it would be known on what terms the goods were held. (GWYNNE, J.—I do not see what possession has to do with the matter. The words in the Act are order, disposition, or possession. There is no doubt on the first two points, so the third is immaterial.) (STOW, J.—That is admitted; but the question is, did he have them there as reputed owner. It seems to me that the cases *Exparte* Ward and *Exparte* Watkins refer more to the custom of warehousekeepers rather than to that of insolvents.) The judgment in *Exparte* Watkins shows that the Court held it was the custom of the insolvent's trade that must be considered. If the creditors of the insolvent in *Watkins'* case had resided in London instead of Liverpool, where the insolvent carried on business, it is clear that they would not have been bound by a custom of trade relating to Liverpool. On the same ground are persons at Port Victor to be held bound by a custom existing at Port Adelaide? Only on the assumption that what has been found to be a local custom shall be held to be known throughout the province. (GWYNNE, J.—That would make it co-extensive with the general law, and would destroy its power as a usage.) That is our contention.

Cur. ad. vult.

9 December—

The *Attorney-General (Way, Q.C.), Ingleby (Q.C.)*, and *Stuart*, in support of the rule.—The first point is the finding of the jury, by which, subject to the points the defendants are authorized to raise, the plaintiff is entitled to a verdict. As regards the case of

Jones v. *Broadhurst*, 9 C.B., 173,

so elaborately argued by the other side, that was a case which decided that payment by another at the request of the person who had obtained goods was equal to a payment by himself. The question in issue in that case was whether a payment without authority could operate in a similar manner. That state of facts does not exist in the present case, because there was an authority to pay and take up the bills. Our learned friends have really misunderstood the effect of the cases they have cited. They have gone contrary to the text-book—

Byles on Bills, 11th Ed., 221
Cook v. *Lister*, 32 L.J., C.P., 121.

We do not propose to follow our learned friends in the cases cited by them, as they are not applicable to the present state of facts.

Randall v. *Moon*, 12 C.B., 261,

does not carry them any further; and

Williams v. *James*, 19 L.J., Q.B., 445,

is really an authority in our favour, as it is held competent for a drawer to enable his agent to sue on a bill, and if a bill be so held then the original holder becomes a trustee. No proposition is more firmly established than this—that in order to constitute a payment it is not necessary that there should be a physical handing over of money. According to

Benjamin on Sales, 2nd Ed., 585,

and the authorities mentioned there, all that is necessary to do is to prove something that will constitute a plea of payment sufficient to satisfy the Statute of Frauds. With an account at debit a transfer in the books has been held to be a payment—

Eyles v. *Ellis*, 4 Bingham, 112.

Suppose that the bill had been sent down to Port Victor for collection, and Murrays had told the Bank they would take it up, a cheque would have been sent down to it, the bill would be honoured, and that would be a payment. The question here is whether a transaction in the books of the Bank equal to what would have been done in the usual course of business, and practically a settlement, is to be considered payment? A debit will operate as a payment and a reloan—

Bodenham v. *Purchas*, 2 B. & A., 39.

An order for a bill at three months will, if the order be taken and the bill even not presented, operate as a payment—

Bolton v. *Richard*, 6 T.R., 139.

A Treasurer of a Union who received from the parish overseers wheat instead of the poor-rates, and who debited them with the value of the rates and credited them in his books, was held to have proved payment—

Stuart v. *Aberdein*, 4 M. & W., 211.

It has been distinctly held that it is not necessary money should pass to constitute a payment—

Maber v. *Maber*, L.R., 2 Ex., 153
Bodger v. *Arch*, 10 Ex., 333
Amos v. *Smith*, 1 H. & C., 238.

(GWYNNE, J.—In an action between Murray and Allen on the bill,

could the latter plead payment?) I think so, but the point is immaterial, as the question is if the Bank brought an action could Allen plead payment? Sums paid subsequent to the transaction have been held to constitute payment—

Worthington v. *Grimsditch*, 7 Q.B., 479.

It has been inaccurately said that the Bank could have sued because they held the bills. It is relied on that Mr. Spence would not give up the bills to any one but the Murrays. In that he was quite correct, for the Murrays having taken up the bills they had become their property; and even if this were not known to Allen, it would not vitiate the agreement between the parties. The next point is whether the doctrine of reputed ownership applies to deeds under the 6th Division of the insolvency Act. It is obvious that a settlement of this point in the plaintiff's favour settles the case irrespective even of the finding of the jury as to payment, because the account was at credit prior to the date at which this action was brought—

Field v. *Carr*, 5 Bingham, 13.

(STOW, J.—But subsequent to the insolvency of Allen.) That is so. The whole case depends entirely upon the construction of the 180th section of the Act. A little confusion has been introduced into the argument by the other side endeavouring to expand the scope of the words "estate and effects." All that the order and disposition clause does is to say that under certain circumstances other persons' property shall be liable to be treated as the property of the insolvent, and shall be sold for the benefit of the creditors. On adjudication the property passes not by contract, but by the operation of law, as set forth in the 100th section of the Act, and up to the obtainment of the certificate all future as well as present property passes to the creditors. But under a deed this power of future acquirements does not exist, and the trustees only take that which the insolvent has at the time he makes the deed. It has been asserted that the 180th clause of

our Act and the 197th clause of the English Act are identical; but it will be seen that the English Act does not notice in any way one of the sub-sections of the 180th clause. (STOW, J.—That is only as to procedure.) By the English Act there are three classes of deeds—composition deeds, deeds which contain a *cessio bonorum*, and deeds known as Schedule D deeds. The latter is substantially the same, if not entirely identical, with our deeds under the 6th Division of the Insolvency Act. These deeds pass only what is contained in the contract. (STOW, J.—Surely something more than what is in the contract passes if such a deed be executed properly.) What passes is defined by the schedule. There has been a judicial construction placed upon this Section 197, and from that it is clear that it was never intended to go further than to meet the cases of fraudulent preference. There was a sort of superstition that this could be avoided by obtaining an order placing the property under the order and disposition clause, but it has been decided that this cannot be allowed owing to the insolvent having been a party to the fraud. (STOW, J.—They are only frauds by the policy of the law.) That is how the matter is put. (STOW, J.—Is it not an incident of the law that property in the order and disposition of the bankrupt pass to the creditors?) No; only that which is in his reputed ownership. Then even it does not pass. It can only be sold for the benefit of the creditors. (GWYNNE, J.—The money is paid over to the assignees, and mingled with the general estate.) That the deed is not equivalent to proceedings in insolvency is clear from the fact that it does operate as a discharge. A man who has made an assignment can be sued though execution cannot issue on the judgment, save by consent of the Court. There are express decisions which show that the clause will not bear the enlargement proposed to be made by the other side—

Wright v. *Jelley*, L.R., 4 Ex., 9
In re *Daunt*, L.R., 6 Chan. Appeals, 455.

It is clear from those decisions that the clause will not bear the universal construction now given to it, and which has been

adopted by the other side. All that is meant to be done is to define the *status* of the debtor, the creditor, and the trustees—

Ex parte *Gibbons*, 13 W.R., 1001, decision of Lord WESTBURY

The other side have shown by a quotation from an argument of the present Solicitor-General, Sir John Holker, that their contention is simply a *reductio ad absurdum*. (*Thrupp.*—The Court overruled his objections.) There is a decision by Lord CAMPBELL that when a counsel of eminence makes an admission as to the state of the law it is to have great weight. (STOW, J.—No doubt the Court is influenced by the argument of counsel, but what they say cannot be taken as an authority.)

Cur. ad. vult.

10 December—

The *Attorney-General (Way, Q.C.)* and *Stuart*, in continuation. —It has been decided that the doctrine of fraudulent preference has nothing whatever to do with the doctrine of relationship—

Marks v. *Feldman*, L.R., 4 Q.B., 481.

Under the English law on an adjudication on an adverse petition, the act of bankruptcy related back to some act prior to the bankruptcy, owing to the bankrupt having had a dealing with the goods. (GWYNNE, J.—Does not the deed here operate from the date of delivery?) No, not till ten days after. It can be set aside during that time. After the ten days, the deed dates from the day of execution. (HANSON, C.J.—Does not the case show that it dates from a prior act of bankruptcy?) Yes, but that is a point immaterial to our case. Even in the case we are citing it is clear that they do not claim under the order and disposition clause, but as the property being the estate and effects of the bankrupt, and not as the property of some other person. Then as to the custom. It has been objected that it must be the custom of a particular trade; that that trade must be the trade of the bankrupt; that it

must be so notorious as to be known to all who had dealings with the insolvent; and that it must be the custom of some particular place. It is absurd to say that parties dealing with another because they live in different localities are to be in a different position to those who are in the same locality as that of the insolvent. Now, the principal case on this point is *in re* VAUX. By applying the principles in that case to the facts here, I think there is a conclusive answer to the contention of the other side. Any person going to Messrs. Main's warehouse, and seeing a large number of goods there, and knowing that they were in the habit of holding goods for other persons, would make a very unsafe deduction if he concluded all the goods belonged to Messrs. Main. But let him go a step further, and examine their books. Though he might find the goods entered in the books as belonging to Allen, it would be very unsafe to conclude that that was an accurate statement, the more especially so when he knew that dealings take place in these goods without any notice being given to the warehousekeeper of the change of ownership until it may be that the goods are wanted, or it is necessary to settle a liability as to rent. The custom of a place alone is sufficient—

Hamilton v. *Bell*, 10 Ex., 545.

In his judgment in that case, Lord Justice MELLISH said it would be sufficient to prove it was the custom of a particular trade, but not necessarily the trade of a bankrupt. It is said, too, that it is sufficient to prove either that it is the custom of a place or of a trade—

Griffiths and Holmes on Bankruptcy.

To illustrate my contention, I would point out that if it became so common in Adelaide for persons to hire instead of buying their furniture, then that class of goods would be excluded altogether from passing by reputed ownership. Then, as regards the cross rule obtained by the other side, I would point out that two juries have decided in our favour. (STOW, J.—On the custom?) No;

this custom was only put to the last jury. There were several mercantile men on that jury. (STOW, J.—No doubt it was a very good jury for the case.) A custom need not be immemorial. It may be in the course of growth. It is sufficient if only a few months old. That is a statement that is true in principle. There is a custom with regard to the West India Docks. Can that be said to be immaterial? All that is required is that you shall prove it is the usage and custom of trade, and that it is a practice resorted to in the ordinary course of business—

Mackenzie v. *Dunlop*, 3 Macq., H.L. Cas., 22
Juggomohun Ghore v. *Manickchund*, 7 Moore's Indian Appeals, 263.

The latter case says, in proving a custom it is not necessary to prove antiquity, uniformity, or notoriety, for on those grounds it becomes a local law —

Brown on Usages, 54 *et seq.*

When there is a conflict of testimony it is a question specially for the decision of a jury—

Ackard v. *Ring*, 31 L.J., N.S., 647.

Assuming that the goods did not pass, whose are they? The defendants cannot be entitled to them by the deed, for if Murrays still remained the creditors of Allen, then the deed is bad, because it is not executed by the requisite quota of creditors, neither in value nor in number. (*J. W. Downer.*—That point was not taken on the rule.) (STOW, J.—Nor on the trial either. It is not open to you.) In the interpretation of Acts of Parliament there are three canons of interpretation which should always be followed—1. That as regards Statutes repealed or made *in pari materie*, one should ascertain the abuses the Legislature wished to correct, and the remedy they sought to provide. 2. That all words in an Act are to have their ordinary and grammatical construction. 3.

That all rights, whether in action or rights of property, are not to be taken away without express words—

Edward v. *Lawley*, 6 M. & W., 289
Perry v. *Skinner*, 2 *ibid*, 476
Holt v. *Myers*, 5 *ibid*, 173
Doe dem. *Governors of Bristol Hospital* v. *Norton*, 5 *ibid*, 928.

The canon we ask your Honors to adopt is that no vested right shall be taken away, nor any hardship inflicted unless it be authorised by express words. The similarity of the 180th clause of the Insolvent Act and the 197th clause of the English Act may give rise to the idea that English decisions have a bearing on our section. The English Act was passed subsequent to the Colonial Act. There has, therefore, been no copying on our part, and the only thing that is common between the two Acts is this 197th clause. This case has to be decided without the light that it is said can be obtained from the judgments of the English Courts. Now, our Act of 1860 was passed simply to render the cost of procedure less expensive, and to legalize what it was found was being done every day to evade this expense. It will be seen that the 197th section of the English Act is divided into four parts.—1. Fixes the *status* of the parties and the jurisdiction of the Court. 2. Fixes the *status* of the parties *inter se*. 3. Defines that the administration in bankruptcy, so far as the law and practice are applicable, may be followed. 4. Defines procedure to be adopted. Both these latter portions are not included in our 180th section. For the application of law and practice of insolvency to the administration of deeds and for procedure, we have special enactments. If the forced construction of the other side be adopted, the clause will be rendered perfectly useless. So far from the clause being intended to collect the estate, as is suggested and as is done in insolvency, it is clear from the 189th or the distribution clause that the object of the Legislature was to do something opposed to the general principles of insolvency. By our Act the distribution is deferred to enable creditors to come in

and prove; but, under insolvency, if a creditor does not prove at the proper time, he must take his chance of fresh assets coming, or of there being any estate left after the other claims have been satisfied. But it is said that by force of this section the property of third persons can be taken to swell the estate of the debtor; but I venture to submit that these words are confined to the *status* of parties connected with the estate, and to the rights of parties *inter se* as regards the estate and effects of the debtor, and that it is impossible to give them a wider signification. The clauses in our Act dealing with this subject are Nos. 77 to 81 inclusive, 84, 85, 88 and 144, all of which are comprised in or equivalent to Section 133 of the English Act. It may be as well to see what these clauses are—77 enables an order to be made compelling third persons to be examined; 78 provides procedure; 79 says third persons who happen to be in Court may be examined without having been summoned; 80 confers a very important power, as it enables a debtor to the estate to be summoned; 81 orders Post-master-General for three months to forward all letters addressed to the insolvent to the assignees; 84 relates to the transfer of stock; 85 enables the Court to order the goods of the insolvent seized by a creditor shall be given up for the benefit of the estate; 88 calls upon trustees, officers, bankers, or agents to pay over moneys belonging to the insolvent; 144 relates to distress for rent. Now, it is very clear that in each of those clauses third persons are dealt with; but it is equally clear that the operation of the Act, even if it may extend to third persons, is confined to the estate and effects of the insolvent. And the contention that the view of the other side is fallacious, if the words of the Act be taken in their natural interpretation, and cannot be supported without importing words the creatures of imagination into the clause, is completely supported by a reference to the 13th clause of the Act—

Ex parte *Alexander*, 32 J. L. Bank, 61
Ex parte *Fuller*, 11 W.R., 924.

(STOW, J.—By analogy does not that case support the defendants'

proposition?) Their contention makes the words do double duty—

Bank of England v. *Price*, 15 W.R., 1061, on the 128th section of the English and 84th section of the Colonial Act.

(GWYNNE, J.—Supposing that on reading the English Act I find that the reputed ownership clause is contained within it, does it necessarily follow that it must be within the Colonial Act?) We think not—

Stanger v. *Miller*, L.R., 1 Ex., 58.

(STOW, J.—If that is not a Schedule D deed I do not see what application it has to the present matter.) It is not. It was quoted by the other side. It has been decided under the 144th clause that a landlord, when there is a composition deed, cannot recover more than twelve months' rent—

Williams v. *Cadbury*, L.R., 2 C.P., 455.

(GWYNNE, J.—The hypothesis being that he could have sued for more. Is not that a deprivation of property?) The case,

Wood v. *Dunn*, L.R., 2 Q.B., 73,

is an authority in our favour, as also is

Porter v. *Kirkus*, L.R., 2 C.P., 590.

(GWYNNE, J.—If you could show some case in which the Court has refused to avail itself of the machinery of the Insolvency Law, it would be very valuable.)

Thrupp, in reply.—The whole of the cases cited by the *Attorney-General*, in support of his contention that there has been a payment, differ most entirely from the case now before the Court.

Nearly all, if not all, refer to cases where payments have been made by entries in books by a person who was agent for both parties—for the person paying, and the person to be paid. These were in respect of transactions that could not have been completed in any other manner. In each case the act has only been done by the consent of both parties. (STOW, J.—If plaintiffs had sent an honourable cheque to both parties to satisfy the bill, would not that have been an order to take it up?) Yes; I admit that. (STOW, J.—Then what distinction is there between a cheque, which is simply a written order, and a verbal offer to pay?) A verbal order is only good to the person to whom it is given. A cheque is a negotiable instrument which passes from hand to hand. It is also protected by special provisions of law. A verbal order to pay would simply mean that the bill was to be placed to debit, whereas if a cheque was sent, the Bank would have to give credit. Besides, by giving a cheque, a man gets time. As regards the cases cited on the reputed ownership branch of the case, I would point out that

Wright v. *Jelley*, L.R., 4 Ex., 9,

cannot apply, as it was decided on a point altogether different to anything involved here. The same remark applies to *in re* Dart; while as regards Visard's trust case, if it is a decision any way it is in our favour. All the other cases cited are decisions on special points, and, therefore, not applicable. As regards the custom, it is clear the *Attorney-General* has misunderstood Mr. BROOM, when he quoted him in support of a general custom; the passage read by him has reference to a particular rule.

Cur. ad. vult.

17 December—

Judgment was now delivered as follows:—

HANSON, C.J., after stating the history of the case, proceeded:—The questions we have to decide are—First, does the answer of the jury to the first question show a part payment so as to satisfy the

Statute of Frauds; second, does their answer to the second question show that the goods were not in the reputed ownership of Allen at the time of the assignment; and, contingently upon the answer to this, was there evidence to support that answer; and third, supposing the second question to be answered in the negative upon either branch, does clause 80 of the Insolvent Act of 1860 apply to deeds of assignment under Division VI. With regard to the first question, I have had some difficulty in arriving at a conclusion, but I am of opinion that the answer of the jury does show a payment to satisfy the Statute. It is conceded that the payment need not be made to the vendor himself, and that it is not necessary that money should actually pass. It is enough if the payment is made by the direction and on behalf of the vendor, and if the act done is in its results equivalent to a payment of money. And it appears to me that the action of the plaintiffs and its results satisfy both of these conditions. At the time when they directed the third bill to be transferred to their debit, they were under no obligation to pay it, excepting such as arose from their contract with Allen. They might have become liable at a subsequent time if the bankers had duly presented the bill and had given them notice of its dishonour. But at this time no liability existed. There is nothing, consequently, but the contract to which their order could be referred; and the bankers who, in compliance with that order, had carried the bill to their debit—that is, had on account treated the plaintiffs as having paid the bill—could not, as it appears to me, have afterwards sued the acceptor upon it, even in the event of the failure of the plaintiffs, for as against them the bill was paid—and it had, in fact, been paid on behalf of the acceptor—so that the necessary element, in order to make the payment a satisfaction of the bill, which was wanting in the cases from 3 M. & S., referred to by His Honor Mr. Justice GWYNNE—viz., that the payment should be made in the name or on the behalf of the acceptor—existed in this case. I do not attach any importance to the circumstance that the plaintiffs' account at the Bank was at this precise moment overdrawn, for, upon the evidence of the course of dealing between the Bank and the plaintiffs, I conceive the Bank would be bound by their entry,

and that evidence distinguished this case from that of *Simson* v. *Ingham*, 2 B. & C., 65, where bankers were held not to be bound by an entry in their books of which the customer had no notice. Nor do I regard it as important that the bankers were not informed on whose behalf the bill was paid. That might have been an element in determining the opinion of the jury as to the fact whether it was or was not paid on behalf of the acceptor, but could not be held to prove that it was not so paid, or even appreciably to weaken the effect of any positive evidence that it was. And it must be remembered that the acceptance of a bill of exchange is of itself an authority to the holder for the time being to receive the amount from or on behalf of the acceptor and to give a discharge on the bill. The plaintiffs were bound and authorized by the contract to pay the bill on behalf of Allen, and the bankers as holders were authorized to receive the amount, and by that receipt to discharge Allen; and the plaintiffs, acting under and in pursuance of their contract with Allen, having by their order authorized the Banks to apply their funds (whether at the time standing in their name in the books of the Bank, or whether then advanced to them by the Bank for the purpose, appears to me immaterial) in payment of the bill; and the Bank having accepted that order and having so applied them, I think that this was a part payment under the contract, and that consequently the requirements of the Statute were satisfied. Much stress was laid by the counsel for the defendants upon the fact that Allen did not know that the plaintiffs had parted with the bills, and that the contract as described by Mr. Gordon was simply that the bill should be handed over, as though the ignorance of Allen on that point would rebut any presumption that the payment of the bill was made under the contract for resale. But Allen knew that the bills were negotiable, and by delivering them to the plaintiffs he had authorized them to transfer the bills to other persons. The discounting of the bill, therefore, was strictly within the right of the plaintiffs, and if by the exercise of that right they had made Allen liable to third parties the discharge of this liability by payment of the bills was necessary to enable them to give up the bills, and the payment required for this purpose was made under

the contract, and would not have been made otherwise. The only difference, therefore, is that under this aspect of the case Allen authorized implicitly, while, if the agreement was that the bills should be retired, he authorized explicitly, and in either case the payment would be made on his authority and on his behalf in performance of the agreement for resale. Questions are also raised as to whether Allen could have pleaded payment if the plaintiffs had afterwards sued him upon the bills, which it does not seem material now to answer, since without giving any opinion as to the proper form of pleading, I can have no doubt that upon the evidence given at this trial, Allen might have successfully defended such an action, because, for the reasons already assigned, I think the instrument was made binding by the payment of this bill to the holders. But, assuming that there was a valid instrument of sale which vested the property in these cornsacks in the plaintiff, we have to consider the second question—Whether they were in the reputed ownership of Allen at the time of the assignment. It is admitted that the goods were standing in the name of Allen in the warehouse, and that no notice of the sale had been given to Messrs. Main; but the jury have found that there existed a usage or practice with regard to goods warehoused in free warehouses in Port Adelaide that they should be sold without notice being given to the warehouse-keeper, and I think that such a usage is sufficient to rebut the presumption arising from the fact that the goods still remained in the name of Allen. The case of *Ex parte* Vaux appears to me to govern this case, and to be essentially of the same character. It is true that there are expressions used by the Lords Justices which refer to the particular trade of the bankrupt, and which were urged by the learned counsel for the defendants as limiting the authority of that decision to cases in which the usage is that of the trade of the bankrupt. But the reasoning is equally applicable to such a case as the present. In England, where transactions are upon a scale of such magnitude as require distinct warehouses for different commodities, almost every usage of the kind would belong to a separate trade. But all the grounds upon which their Lordships rely would be equally applicable to any other goods that might

happen to be deposited in the same warehouse, since they are not limited to the wine and spirit trade, which was the trade in that case, but apply to a practice prevailing in bonded warehouses as warehouses (and the same reasoning would be equally applicable to free warehouses), and would embrace goods, of whatever kind, deposited in those warehouses, if the custom had been shown to extend to them. And it is clear that the custom would not be affected by the circumstance that some persons did not avail themselves of it. It can hardly be doubted that even in that trade there would be some persons who would give notice of their purchase, either not knowing or not deeming it wise to rely upon the custom. And in the cases relating to machinery, also, it is quite certain that many mill-owners, probably the vast majority, work mills with their own machinery; but, nevertheless, the fact that it was usual when premises were let to let the machinery with them was held sufficient to prevent the machinery from passing to the assignees, since the existence of such custom would raise a reasonable doubt as to the real ownership, and thus rebut the repute of ownership arising from the fact of ostensible possession. And so with regard to the practice which has arisen within a few years of selling pianos on deferred payments, the property not passing until the last payment is made. It is probable that the very great majority of persons who possess pianos are their real owners, nevertheless, the existence of such a practice would, I consider, warrant a jury in finding that any particular insolvent, who had agreed for the purchase of a piano under such circumstances, was not the reputed owner. It is not, as was argued by *Mr. Downer* would be the case, that the law is altered for the sake of careless people; but that when the law appropriates the goods of one person to pay the debts of another on the ground that he has, as is assumed, unconscientiously, allowed that person to obtain credit by means of his being reputed to be the owner of such goods, then any custom which shows that the repute of ownership does not necessarily or naturally arise may be taken into consideration by a jury or by the Court, and the only question would be whether there is such a custom. The law does not alter, but the changing habits of a commercial community alter

the bearing of the facts to which the law is applied. As stated by ALDERSON, B., in *Hamilton* v. *Bell*, the same circumstances which, under a given course of trade, might be conclusive proof of ownership, might, if that course of trade was altered, afford no presumption on the subject. And it is always a question for the jury whether the actual circumstances of the case do or do not amount to such a proof. In the present case, there was no apparent possession in the ordinary sense. No one from seeing the goods in the warehouse of Messrs. Main could have supposed that they were the property of Allen. In order to ascertain to whom they belonged it would be necessary to make enquiries, and such enquiries might be expected to show, not only that the goods did stand in his name, but also that, notwithstanding this, they might have been previously sold, and that he had no interest in them. I think, therefore, that the plaintiff is entitled to have the rule made absolute. It is not necessary, therefore, to decide the question whether the clauses as to reputed ownership apply to assignments under Division VI., and I confess that I should have some difficulty in forming an opinion on the subject. The suggestion thrown out during the argument by my learned colleague Mr. Justice GWYNNE, that the words of the 180th section must have reference to the same subject-matter as that which was to be the subject of the assignment by the debtor, and, therefore, would not apply to goods which at the time of the assignment were the property of another, and so no part of his estate and effects, appears to me entitled to great weight, and I am not prepared to say that it is outweighed by the authorities cited on behalf of the defendants. The question, however, does not now arise, and I refrain from expressing any opinion upon the subject. With regard to the rule for a new trial obtained by the defendants, I am of opinion that there was evidence to warrant the finding of the jury; and, as the learned Judge who tried the cause does not report that he was dissatisfied with the verdict, I am of opinion that it should be discharged.

GWYNNE, J.—I assented to my colleagues giving judgment on the present occasion, though I was not ready to do so;

but, if necessary, I will deliver a written judgment at some future day. I think I need make no apology for such a course. Since the arguments in this case took place I have been heavily engaged in the case of *Levi* v. *Ayers*, and I have been also deeply absorbed writing a judgment in *Forrest* v. *Forrest*, a case on the construction of a will, involving in its decision many thousands of pounds. I thought that case of more importance than the present. It may be that there are questions of importance in this case, and that an expression of opinion on our part would be interesting to the profession and to the parties immediately concerned; but from a pecuniary point of view it is not of so much importance as *Forrest* v. *Forrest*, as it only involves a few hundreds instead of a few thousands, and as I could not prepare a written judgment in both cases I elected to do so in *Forrest* v. *Forrest*. I do not object to the practice that has been adopted by my learned colleagues, it being understood that if necessary I will give a full-considered and deliberate judgment. A great number of cases were cited in the arguments put before the Court. For what purpose are cases cited in this Court? Are they cited simply as a display of legal learning and research and talent, or are they cited as a guide for the Court when it is forming a decision on a case? In the books at home a case is reported as being notorious because nearly as many as thirty cases are quoted; but here is a minute-book full of cases quoted. If we are expected to read and consider these cases—and I do not see how we are to do otherwise if we wish to show any respect for the Bar—the space that has taken by my learned colleagues in preparing their judgment is altogether too short to come to a decision upon such a case. I do feel it a burden the quoting of so many cases, and I desire—without any wish to make an offensive remark—to say this, that the Bar would add much to the efficient administration of the law if they themselves would weed out the cases and quote five or six that really touch the points at issue, so that the Court might be immediately able to master the principles they are asked to adopt. It is to be supposed that cases are only cited which are pertinent to the issue, and the Judges are bound in performance of their duty and out of respect to the Bar to look at the cases at least in

a general way. For the reasons I have already stated, I have had no such opportunity. The point on which I shall differ from my learned colleagues is this—I am not satisfied that there was a payment sufficient to satisfy the Statute of Frauds. My impression at the end of the arguments was that what had been done did not in point of law satisfy the Statute. I retain that opinion most strongly. Such being the case the second question would become immaterial, for in my view of what is sound law, the Statute of Frauds not having been complied with, the property never passed to the plaintiffs. The view I take of the payment they made is this—that they simply did what was their duty. Looking at this as a contract of rescission or resale, what was incumbent on both parties? On the one hand, Mr. Allen would have to deliver to the plaintiffs the cornsacks, and on the other they would have to take up the bills. The moment the contract was made, in common justice, in equity, as well as in law, all Allen's liability to the Murrays would be at an end. That being so, that he had no liability—which by hypothesis seems to be the necessary consequence—it is clear that the Murrays made a contract, under which they became liable for these bills, and it was their duty to destroy them or return them to Allen. Then how can it be said that the Murrays acted as the agent of Allen, when they could only do as agent what they were bound to do as principals? They made this payment, too, at a time when their account was at a debit, and such being the case, the Bank could have at any time sued upon the bills. Then how can the Murrays say this was a payment on their part as the agent of the acceptor? In point of fact, as I have already said, they were not the agents of Allen, for they had taken upon themselves the duty to meet these bills. Perhaps had the matter been pushed, and the whole conversation on which this duty was founded had been put before the jury, there would have been better light in which to decide this case; but so far as I can understand the matter it is this—they were to get the sacks, and Allen was to have the bills through the instrumentality of plaintiffs. The views I am now expressing are the same as those to which I gave utterance during the course of the arguments, and my feeling on the point is only intensified since I have had

the advantage of hearing the judgment of the CHIEF JUSTICE. If it is intended to take this case elsewhere, then I shall be happy to put in writing the grounds of my opinion that there ought to have been a nonsuit. If, however, it is intended to let the matter rest it will be useless for me to do that, as the judgment of my colleagues will bind the Court. I dissent from their decision.

STOW, J.—These are two rules, one obtained by the plaintiffs asking for liberty, pursuant to leave reserved at the trial, to enter a verdict for the plaintiffs for £402, the agreed and conditionally assessed damages, the verdict having been by my direction given for the defendants; and the other a conditional rule for a new trial, on the ground that the verdict of the jury was against evidence. The action was trover for the recovery of thirty bales of cornsacks. The plaintiffs relied on a contract for sale to them by Allen, a debtor, who has executed a deed of assignment under the arrangement clause of the Insolvent Act. There was no question that a verbal contract had been entered into under the circumstances set out in my judgment given on the argument on the rule for a new trial in this cause on the 18th August last, and the question reserved on this point of the case was whether there had been a part payment sufficient to satisfy the Statute of Frauds. The evidence showed that Allen had bought the sacks from the plaintiffs, giving them acceptances in payment, which, or renewals thereof, were under discount and unpaid, and not due when Allen and the plaintiffs agreed that the plaintiffs should take back the sacks, and that Allen should be relieved from his liability on the bills, and that they should be given back to him. The plaintiffs, whose account was overdrawn with their Bank, in whose hands the bills were as discounters thereof, requested the Bank to place the bills to their debit, and one of the bills was so placed to the debit of the plaintiffs on the 9th March, the day on which it became due, and, as the Manager swore, with a view to the discharge of all parties to the bill so far as the Bank was concerned. The question now to be considered is whether with the new light thrown on the case by evidence given on this trial, that the

plaintiffs' account was overdrawn when the bill was debited to them, the charging of the bill to them in the books by the Bank amounted to payment. The case of *Cook and Others* v. *Lister*, 32 L.J., C.P., 126, shows that, although payment by an intermediate party to a bill to the holder does not of itself discharge the acceptor, yet it does so in the case of an accommodation bill, or where it would be against justice that the acceptor should be sued. Assuming that the debiting the amount to the plaintiffs was a payment of the bill of the 9th of March, I am of opinion that that payment having been made by the plaintiffs, as a part performance of their agreement with Allen, was a payment for and on his account. It is said that he did not know when he made the contract of sale that the bills were under discount. He certainly gave evidence to that effect. But, considering that the discounting of bills of that description is very usual, and that it is well known that such a business as that of the plaintiffs is carried on by the discounting of their trade bills, and that the plaintiff Gordon said in his evidence that the understanding was that Allen was to be relieved of the bills, I think that if the point had been urged on the consideration of the Court and jury on the trial, which it was not, that the jury would have been entitled to have found that Allen authorized the plaintiffs to pay the bill in question, and that the payment was on his account; at all events, if Allen had been sued by the plaintiffs or the Bank on the bill, the facts (subject to the question of whether the debiting the amount to the plaintiffs amounted to a payment) would have justified a verdict for Allen on the ground of payment by the plaintiffs to the Bank, and that the payment was one of which he could take the benefit. That the Bank did not know that the payment was on account of Allen is immaterial. It could be of no benefit to the holders, who only required payment to inform them on whose account the bill was paid. See *Pollard* v. *Ogden*, Pub. Officer, &c., 22 L.J., Q.B., 439. It was sufficient if it was really paid for Allen, and that is found in the verdict. But it seems to me that this point has been already decided in the former judgment in this case, and that the only question is whether the debiting of the amount of the bill by the Bank at the request of

the plaintiffs, their account being then overdrawn, was payment; and I have come to the conclusion that it was. It appears to me that it was a loan by the Bank to the plaintiffs of the amount of the bill with a view to and that it operated as payment thereof as much as if the money had been handed to the plaintiffs, and they had returned it in payment for the bill. The point so much relied on, that the bill was not given up, was disposed of in the former judgment. Allen might have found it more difficult to prove his case if he had been sued on the bill by reason of its remaining in the Bank; but if the facts were as proved on this trial, he would have succeeded notwithstanding. The next question is that of reputed ownership, upon which two points were raised. First, whether the doctrine of reputed ownership applies to deeds under the 6th Division of the Insolvent Act; second, whether, if so, the usage found by the jury rebuts the presumption of the reputed ownership of Allen arising from the goods being in the warehouse in his name. The cases of *ex parte* Watkins, L.R., 8 ch. 520, and *Ex parte* Vaux, L.R., 9 ch. 602, are cases very much in point In the first, a spirit-merchant and keeper of a bonded store had some spirit which he had sold to a third person; the spirit was in his store at the time he became bankrupt, and his assignees claimed it under the reputed ownership doctrine. But on proof that it was very usual in the trade for persons who had bought spirit to leave it in the store until it was wanted, the Court held that the repute was disproved, and that the goods did not pass to the assignees, and it was said that the existence of the usage placed the parties in the same position as if over the store there had been a notice that goods stored there were not necessarily the property of the warehouseman, as they might have been sold and left there. In the case *Ex parte* Vaux it was held that goods left in a warehouse in the name of a person who subsequently became bankrupt, and which he had sold, did not pass to his assignees, although still remaining in the name of the bankrupt, the usage proved *ex parte* Watkins being proved in this case also. In the present case the usage found by the jury is that it is the usual usage of trade at Port Adelaide to leave goods which are warehoused after they have been sold there in the warehouse without

notice of the change of ownership to the warehousekeeper. This being so, it is the same thing as if over Messrs. Main's store there had been a notice to the same effect, that the goods stored there were not necessarily the property of the person in whose name they stood, as they might have been sold. The defendants contended that the custom must be of a particular trade. This, however, is not necessary. It is sufficient if it is the custom of a particular place, and it is found to be the custom at the Port. Again, it was said that it must be the custom of the insolvent's trade. But this is clearly not so, and it is not necessary to enumerate cases to show this. Those on the question of furniture, pianos, &c., are authorities to the contrary. Then it was strenuously urged that it must be the custom of the place where the insolvent carries on business. In my opinion the question is, what is the mode of dealing at the place where the goods are? If the insolvent carries on business in another place his creditors or persons about to deal with him are not likely to know that goods which are not his own are in his possession at another place than that where he carries on business, unless they live in or have business at the place where the goods are, and then the usual mode of conducting business would be presumed to be known to them, and the evil which the reputed ownership doctrine was intended to prevent, namely, that a man should get credit on the strength of the possession and reputed ownership of goods which were not his, would not arise, since those who would probably know that the goods were in the bankrupt's possession would know also that that fact under the circumstances afforded no guarantee that they were his, and that, from the usual mode of dealing with such goods they might be the property of some one to whom they had been sold. As the decision of these two points in their favour entitles the plaintiffs to have the verdict entered for them, I shall not offer any opinion on the question whether the reputed ownership doctrine can be applied to deeds of arrangement, on which I have serious doubts, and which appears to me to be one of very great difficulty. As regards the defendants' rule for a new trial, on the ground that the verdict was against evidence, I have already intimated that I am not dissatisfied with

the verdict, although I should have been inclined had the question been one for my decision to have found the other way, but the question was essentially one for a jury. There was evidence on both sides, and the effect of the contradictory evidence in matters of mercantile usage, and the difficulties in the way of finding a usage proved, when persons in business in a place swear to their ignorance of the usage, were pointed out to the jury. They, however, found for the usage, and I should be unwilling to dispute their verdict. I think that the plaintiffs' rule to enter the verdict in their favour should be made absolute, and the defendants' rule discharged.

Plaintiffs' rule made absolute.
Defendants' rule discharged.

HANSON, C.J., GWYNNE, J., STOW, J.] [COMMON LAW.

17 DECEMBER, 1875.

MADGE v. FERGUSON AND OTHERS.

MERCHANT SHIPPING ACTS, 17 *and* 18 *and* 25 *and* 26 *Victoria.* —*Marine Board Act, No.* 6, 1873—*Cancellation of Certificate*—*Tribunal.*

By Section 242 *of the Merchant Shipping Act*, 17 *and* 18 *Vic., power is given to the Board of Trade to cancel certificates of masters and mates in certain cases, which power is*—*by Section* 23 *of* 25 *and* 26 *Vic., c.* 63—*vested in the "Local Marine Board Magistrates, Naval Court, Admiralty Court, or other Court or tribunal by which the case is investigated or tried."*

By Section 13 *of the Marine Board Amendment Act, No.* 6 *of* 1873, *power is given to the Marine Board to appoint persons, with the assistance of the Stipendiary Magistrate for the place; or, if there be no such Stipendiary Magistrate, with the assistance of a competent legal assistant, to be appointed by the Treasurer, to enquire into any charge of incompetency or misconduct made against any master, mate, or engineer, which tribunal is empowered by the same Act to cancel or suspend the certificate of such master, &c.*

Certain charges having been preferred against the master of a vessel, the Marine Board—one of its members having been appointed a Special Magistrate for purposes of the Marine Board Act of 1860 —*appointed themselves a tribunal to investigate such charges, and as such tribunal cancelled the master's certificate.*

Held—1. *That the tribunal contemplated by the Merchant Shipping Act was a tribunal appointed by the local Legislature, who had no power to delegate their authority to appoint such tribunal to the Marine Board.*

2. *That the* 15*th section of the Marine Board Amendment Act*, 1873, *negatived the right of the Marine Board to sit as a tribunal in the matter, and disentitled them to appoint themselves as such tribunal.*

SPECIAL case. The facts were as stated in the head-note. Plaintiff was the master of the steamship "Leo." On the 9th August, 1874, Messrs. Way & Symon, as solicitors for the agents of the "Leo," wrote to the Marine Board, requesting an investigation into the conduct and capacity of the plaintiff. On the 31st August, Stilling & Co., the agents, furnished the Board, at its

request, with specific charges. On the 2nd September, 1874, the plaintiff, with counsel, attended a meeting of the Marine Board, when a preliminary investigation was held, and the Board appointed, as a tribunal to investigate the whole matter, Mr. J. Formby, and Captains Smith, Tapley, and Ferguson—all members of the Marine Board. On the meeting of the tribunal, plaintiff's counsel, *Mr. Dashwood*, protested against the jurisdiction and constitution of the tribunal, and under such protest cross-examined the witnesses for the agents. The plaintiff himself was examined, and handed in his certificate to the Court; and the Court decided that the charges being proved, the certificate must be cancelled. The decision was not reported either to the Governor or to the Treasurer, nor was it confirmed by either before the Board cancelled the certificate. Captain Ferguson had been appointed Special Magistrate for the purpose of the Marine Board Act, 1860. The questions submitted for the answer of the Court were —1. Was the tribunal lawful? 2. If so, was it lawful in its procedure? and, 3. The defendants claimed to have acted *bonâ fide* and judicially. Were they thereby protected? If the questions be answered in the negative, verdict to be entered by consent for £200; if in the affirmative, for defendants, with costs.

Bundey, for the plaintiff.—In the first place, I refer to the Merchant Shipping Act of 1854, 17th and 18th Vic., c. 104. Sub-section 6 of clause 2 shows who are the Board of Trade. Clause 6 *et sequentia* show the general functions of the Board. There are four tribunals—the Board of Trade, the Court of Admiralty, the Local Marine Board, and certain Justices appointed by those Boards. It will be seen by a reference to the clause on the constitution and power of these Local Marine Boards that they have functions which the Marine Board here has not, nor is ever likely to have. The clauses I have referred to are 110 to 121 of the Merchant Shipping Act, 1854. Clauses 241 and 242 refer to the powers of the Justices that are sometimes appointed to conduct these enquiries. Clauses 432 and 433 refer to special occurrences, and to enquiries into wrecks and casualties. By the amending Act, 25 and 26 Victoria, c. 63, section 23, the powers of the

previous Act were extended to colonial tribunals legally authorized by the local Legislature. No such Court—that is my first point—has been constituted by the Legislature in this province competent to examine on the incompetency of misconduct of master mariners holding Board of Trade certificates. The first of our local Acts on the subject is No. 17 of 1860, which, among other things, created the Marine Board. (The *Attorney-General (Way, Q.C.)*—We don't rely on that.) I refer to it to show that the power the Marine Board then had of making investigations was confined to wrecks and casualties. Then came the amending Act of 1873. Part 4 provides for the examination of masters, mates, and engineers, and for the granting of certificates of competency to persons who do not hold Board of Trade certificates. Clause 13 gives them the power to revoke certificates granted under the previous clauses in case of incompetency or misconduct. The investigation for such purpose shall be conducted by such persons as the Board may appoint, aided by the Stipendiary Magistrate appointed for such place; and if there be no such Magistrate, then by a competent legal adviser. The accused is to be summoned, so that he may have the opportunity of making a defence. (GWYNNE, J.—You say the Board has only a power to undo what they have previously done.) Precisely. Even admitting, for the sake of argument, that there is the power to constitute such a tribunal, then it must be done, not by the Marine Board, but by the local Legislature. (STOW, J.—They affect to act as a local Marine Board.) A thing they have no power to do. Clause 15 shows the power of the tribunal in trying cases of this description, and clause 16 clearly proves that the Marine Board is an appellate and vetoing tribunal. Even, for the sake of argument, making another concession, that the Marine Board could have appointed this tribunal, then I say most confidently that they could not appoint themselves. (STOW, J.—I know nothing against a member of an appellate Court sitting in a Court below.) But it was never contemplated they should appeal from themselves to themselves. (STOW, J.—The Primary Judge sits in this Court when we hear Equity Appeals.) (GWYNNE, J.—And a most anomalous thing it is.) (HANSON, C.J.—The Lord Chancellor sits

with the Lords Justices in Chancery, and then hears the same cases on appeal in the House of Lords.) (GWYNNE, J.—But then he has his equals alongside of him.) Then I contend they had not the assistance of the Stipendiary Magistrate of the place. Under the present Act, Captain Ferguson holds no appointment. He was appointed for the purposes of the Act of 1860, and there has been no issue of a fresh commission. And, finally, I would point out that, even making every concession, and admitting that the Board was right up to the eleventh hour, then they acted *ultra vires*, as they cancelled the certificate without having their report confirmed either by the Governor or the Treasurer. On those grounds I contend we are entitled to a verdict..

J. W. Downer, on the same side.—(HANSON, C.J.—Look at the words in the 18th section, "whether of the said province or otherwise.") That is the only clause which refers to certificates granted out of the colony. (STOW, J.—Even if it did apply to English certificates, that would not give the Marine Board jurisdiction. The acts complained of were done out of our waters.) (GWYNNE, J.—There is also the question of repugnancy. Surely the British Legislature kept control over British ships. It might apply to certificates issued in the neighbouring colonies.) It might, but it will be argued that it applies to British certificates. Considering that the clause is a highly penal one, surely the Court will not put such a construction on the clause when there are no express words on the matter. There is no mode of procedure provided for by the Board of Trade or the Marine Board; but even if that is so, surely they are not to be allowed to evade the Act. If such a thing were tolerated it would work the very greatest injustice, and do away with the express intention of the Act. (GWYNNE, J.—It would be like a Grand Jury trying a prisoner and convicting him.) It would be a gross evasion of the spirit of the Act.

HANSON, C.J.—What do you say to that, *Mr. Attorney?*

The *Attorney-General (Way, Q.C.)*—There is no prohibition in

the Act whatever against members of the Marine Board being members of the tribunal. The 14th and 15th clauses of the Act are copied from the Imperial Act, and were evidently inserted by the draftsman under a misapprehension. The Marine Board here have no power to go to the Governor for a confirmation of their report. They may report to the Treasurer; but they must send their report home to the Board of Trade. Supposing the Hon. John Bright was requested to investigate the conduct of a Captain at Liverpool, would he be disqualified because he happened to be a member of the Board of Trade?

HANSON, C.J.—It seems to me impossible to get over the difficulty that clause 242 of the Merchant Shipping Act of 1854 has, by the amending Act of 1862, been extended to the colonies. In the colonies, the tribunal that must act must be one legally authorized by the local Legislature. It cannot be one appointed by the Marine Board. Perhaps if I could read the English Act together with the colonial Acts I might come to the same conclusion as yourself as to the introduction of these clauses; but I feel bound to say that we are restricted to the limits of the colonial Act, and such being the case, I must decide in favour of the plaintiff.

GWYNNE, J.—I concur. I should be surprised to find that the British Legislature had parted with its power over British ships and seamen. All I believe it contemplated was that a fair tribunal should be obtained for similar matters so far as the colonies were concerned. It had confidence that the colonial Legislatures would do justice, and that they would appoint a fair tribunal. Could the Marine Board be a fair tribunal? I think not; for, from the very nature of things, the members of the Board must and do come into collisions with captains of vessels, and they are, therefore, very unfit persons to constitute such a tribunal. The fact of the Board doing individually what it could not do as a Corporation would simply be appealing from Philip drunk to Philip sober.

STOW, J.—I concur also. I think the 15th clause takes away

the power of the Board to sit as a tribunal in such a matter. It would be well if the Government paid attention to the commission of Captain Ferguson, as it appears to be hardly sufficient to qualify him under the Act.

HANSON, C.J.—I may say I think it would be well if the Legislature placed in the Marine Board the power to conduct these examinations. I have not had the experience which the Primary Judge seems to have had with regard to Marine Boards, but I venture to think that men acting in a public capacity would have a sense of responsibility upon them, and would set aside all private feelings.

Questions 1 *and* 3 *answered in the negative. Verdict for the plaintiff. Damages,* £200.

HANSON, C.J., GWYNNE, J., STOW, J.] [EQUITY APPEAL.

25 NOVEMBER AND 17 DECEMBER, 1875.

FORREST v. FORREST.

APPEAL.—Will—Construction—Effects.

A testator by his will, after certain specific devises and bequests to his children, continued thus—"And to Susannah, my beloved wife, I give the residue of all my goods, cattle, chattels, and other effects, and I appoint her my sole executrix."

Held—*That the residuary realty did not pass by the above residuary bequest.*

Decision of the Primary Judge, 9 S.A.L.R., affirmed.

Per GWYNNE, J., Quære—1.—*Does the word the "Governor" in the 13th section of "The Intestate Real Estates Distribution Act, 1867," mean the Governor at the time of the passing of the Act, or the Governor for the time being?*

2.—*Can the Officer Administering the Government exercise the power of issuing proclamation conferred on the Governor by such 13th section?*

3.—*Is the authority conferred on the Governor by such 13th section an authority to exercise an act of legislation; and, if so, can the Local Legislature delegate to others any part of its legislative functions?*

4.—*Is the above Act in force, the proclamation fixing the day from which the same was to take effect having been issued by "the Officer Administering the Government?"*

APPEAL from a decision of the Primary Judge reported in a former part of this volume.

The facts were as stated in the head-note.

The *Attorney-General (Way, Q.C.)*, for the plaintiff.—I would call your Honor's attention to the decision in

Wright v. *Shelton*, 18 Jur., 445.

(GWYNNE, J.—But the case does not apply, as there is no heir-at-law in South Australia.) That removes a difficulty out of my

way. Heirship has always been the capital distinction between realty and personalty, and if it had existed it might have been said there could be no contention as to the meaning of the testator. But there was not such a beacon to guide the testator, and though the words might perhaps not be apt as to realty, words had been used which to an illiterate person as regards rules, I think, will pass realty. It has been held that the word "effects" is sufficient to pass realty—

Phillips v. *Beal*, 25 Beavan, 25.

The Primary Judge, by giving costs against the plaintiff, might lead the Court to believe that this was an adverse suit. (GWYNNE, J.—I gave costs because I thought the matter was so clear that there ought not to have been an argument.) But your Honor took time to consider judgment. (GWYNNE, J.—That was owing to your argument making me think I was ignorant of the law. What you said upset all my notions, and I was obliged to re-read the authorities to see which of us was right.) But when the case was set down for hearing, your Honor said it was a very proper matter to be heard. (GWYNNE, J.—I only saw the endorsement of the petition. All questions of construction of wills affecting the interests of infants are proper matters for the Court of Equity. When, however, I read the petition I had no doubt on the matter.) The presumption of law which the Court always endeavours to give to wills is that the testator did not die intestate. The Court would seize upon special words, or interpret the general tenor of the will if possible in such a manner as to prevent such a conclusion. (GWYNNE, J.—That is an admitted principle and need not be argued. I would point out that it has been held that it is not proper to cite authorities as to the meaning of words in a will, as the decision ought to go upon the context of the will and the apparent general meaning of the testator.)

Bakewell, in support of the judgment.—The *Attorney-General* has admitted that without the help of the word "effects" the will would not pass realty. But the grammatical construction of the

will shows that "effects" stands alone, and the meaning of the words when alone has been clearly decided not to do so—

Doe d. Hick v. *Dring*, 2 M. and Sel., 448
Camfield v. *Gilbert*, 3 East., 516
Doe d. Haw v. *Earles*, 15 M. and W., 450.

Wright v. *Shelton*, relied upon by the other side, is fully explained and reviewed in

1 Jarman on Wills, 3rd Ed., 711,

and if looked into will be found to be an authority for my contentions.

Phillips v. *Beal*,

the fresh case cited by the other side, was on a will of much more comprehensive words than those in the will now sought to be construed. There have been cases on wills in which more comprehensive words than those in the will in question have been held not to pass realty—

Cook v. *Jaggard*, 35 L.J., Ex., 76
Cross v. *Wilks*, 35 Beav., 562.

The question as to costs is immaterial to my client.

Cur. ad. vult.

17 December—

Judgment was now delivered as follows:—

HANSON, C.J.—If we had to gather the sense of the testator's intentions and decide accordingly, I might be inclined to think the plaintiff right in her contention. The case, however, cannot be thus decided, and the construction to be put on the words the testator has used must be according to the meaning they bear according to judicial decisions. I have some doubts as to whether

the words of the will, if thus construed, would not bear out the plaintiff's contention, but those doubts are not strong enough to induce me to dissent from the decision of the Primary Judge, and I must therefore give judgment against the appeal.

GWYNNE, J.—This is an appeal to the Full Court against an opinion of mine declared on a special case submitted to and decided by me as Primary Judge; and the question raised is one of construction arising on the will of William Forrest, late of Pinkerton's Plains, in this colony, farmer, deceased. The case was argued before me by the *Attorney-General (Mr. Way)* on behalf of the plaintiff, and by *Mr. Bakewell* on behalf of the defendants, and I declared my opinion to be that, under the words "the residue of all my goods, cattle, chattels, and other effects," upon the true construction of the said will the widow does not take the residue of the testator's real estate; and, following the ordinary rule observed by the English Court of Chancery as to costs, and exercising the discretion placed in the Primary Judge in that respect, I expressed my opinion that the plaintiff, as the unsuccessful suitor, ought to pay the costs. I was, moreover, induced to nonsuit the plaintiff with costs, as I thought it my duty to discourage attempts on estates for costs incurred by useless litigation—I then, as well as now being of opinion that this case is so clear that it ought not to have been stated. The case has been re-argued before the CHIEF JUSTICE, my learned colleague Mr. Justice STOW, and myself, but the opinion I expressed as Primary Judge remains altogether unchanged. The argument on the appeal went mainly on the meaning of the word "effects" as used by the testator in the will. Now, it appears to me, upon a view of the authorities, that the primary import of the word "effects" relates to things personal only; and I think that even the plaintiff's counsel will not, after the cases of *Doe* v. *Dring*, 2 M. & Sel., 448, and *Doe d. Haw* v. *Earles*, 15 M. & W., 480, venture to dispute that proposition. It is not necessary that I should review the whole of the authorities upon this subject, but if it were, I would refer to 1 Jarman on Wills, chapters 22 and 23, where they are accurately collected and skilfully classified. I

cannot, however, refrain from referring shortly to the case of *Doe* against *Dring*, because Lord ELLENBOROUGH, C.J., there says that that case was the first in which the Court had been called upon to pronounce on the technical meaning of the word "effects" denuded of all context. In *Camfield* v. *Gilbert* and *Doe* v. *Lainchbury*, it was taken for granted that "effects," in its natural signification, imports personal effects; but Lord ELLENBOROUGH goes on, in the case of *Doe* v. *Dring*, to observe no case has yet occurred in which that signification, unaided by context, has been extended to real estate. And the Full Court of King's Bench consequently held that "effects" primarily imported only personal effects. The case was a peculiarly hard one on the testator's family. By his will he gave and bequeathed in these words:—"To my wife, Elizabeth, or reputed wife, *all and singular my effects of what nature or kind soever*, to her own use and enjoyment during her natural life, and at her death to be equally divided between our surviving children." It will be observed that the testator, in his will, uses the words "or reputed wife." The fact was that the woman had a former husband living at the time of the testator's marriage with her, but that fact was unknown to both parties. So that the real estate of which the testator died seised went over to a nephew of the testator's as his heir-at-law—the testator's eldest son, of course, not being his heir because of his illegitimacy. This hardship was pressed upon the Court. And, indeed, Lord ELLENBOROUGH expressed regret that he could not decide the case upon other principles than those to which authority bound him. His words are—"It is, no doubt, a matter of great regret to be compelled so to decide, because one cannot but feel that such a decision may, and, perhaps, will disappoint what ought to have been, and what probably was the intention of the testator; but we cannot yield to our wishes and overstep the fair rule of construction in order to give to the word a sense more agreeable to our inclinations and the testator's duties, which sense it does not of itself bear." The case of *Doe d. Haw* v. *Earles* decided that the words "all my household goods, live stock, furniture, plate, wearing apparel, and other effects at this time in my possession, or that may hereafter become my property," did not pass real estate, although the testator was

seised in fee simple in remainder expectant on the death of one Martha Simpson, who survived him, of certain freehold houses in Hoxton—POLLOCK, C.B., observing that the words "or that may hereafter become my property" meant things of the description of personal estate placed before these words. Assuming, then, that this Court is to be bound by the authority of the English Courts, it is clear and settled law that the word "effects" of itself, and denuded of context, does not comprehend real estate. Then the question remains—Has the testator shown by any other part of his will that he used the word "effects" with such an expanded meaning as to include real estate? for it is clear that the word "effects" may be so used as to pass real estate, so may any other word if used by the testator with an intention apparent on the face of the will so to use it. Thus, in *Doe d. Tofield* v. *Tofield*, the words "personal estate" so explained were deemed to be sufficient for the purpose of passing real estate. And in *Doe d. Andrews* v. *Lainchbury*, 11 East, 296, Lord ELLENBOROUGH says, "I know of no word in general use so inflexibly importing one meaning only as to be incapable of bending to the manifest sense of the party using it differently." Having referred shortly to the rules of construction applicable to the case before us, and which are clear, fixed, and certain, I proceed to apply them to the case before the Court. On referring to the will of the testator Forrest, in its general form and scheme it appears to me a methodical and clear expression of the testator's intention. The first disposition is of a section of land to his eldest son George, in fee; the second is of a section of land to his son William, in fee. The testator then turns his mind to his personal estate, and gives a sum of money to his son Richard, expressing the purpose of the bequest, and then proceeds with these words—"And to Susannah, my beloved and lawful wife, I give the residue of all my goods, cattle, chattels, and other effects, for her own individual use, and I appoint her my sole executrix." The will, it will be observed, is dated the 27th February, 1852, but the testator did not die till twenty-three years afterwards, namely, on the 9th of February, 1875. At the time of his making his will he had, besides the two sections of land, a small piece of land in Adelaide, but which,

probably from forgetfulness, he did not devise. At the time of his death, however, he was seised of real estate to the extent of some thousand pounds in value. Recurring again to the will, and bearing in mind the fact that, after the dispositions to his sons, the testator was seised of a residuary real estate, and was also possessed of a residuary personal estate, he proceeds to give a residuary estate to his wife; and the question raised is—Did he intend to give the whole of his residuary estate, as well real as personal, or his personal estate merely? To my mind, the will speaks so plainly that there is no room for doubt. The testator's words are—"And to Susannah, I give the residue of all my goods, cattle, chattels, and other effects." As put by *Mr. Bakewell*, in argument, had the testator stopped immediately after the word "residue," there would have been fair ground of argument for the plaintiff's construction that both the real and personal residuary estates passed; but instead of that, the testator goes on and defines which of the two residuary estates he meant, namely, the "residue of his goods, cattle, chattels, and other effects;" that is, the residue of his personal estate after paying his debts, funeral expenses, and the £100 to his son Richard. Then there is the collocation of the words. The terms "other effects" are in the society of the words "goods, cattle, and chattels"—words descriptive of personal estate; and, according to the authorities, the words "other effects" so placed mean personal effects. And it is not unimportant to observe the appointment of the executrix follows immediately on the residuary gift. Now, looking at the general scheme of the will, and studying its language, I fail to discover the slightest inclination on the part of the testator to use the words "other effects" otherwise than in their primary and natural sense. And, no doubt, the learned *Attorney-General* felt the difficulty he was in, and tried hard to clothe the words "other effects" with a context. His principal argument for that purpose was framed on the meaning of the word "residue." He submitted that the expression "residue" in the gift to the wife had reference to the previous part of the will, in which land only was devised, and that therefore "residue of other effects" must mean residue of the subject mentioned in the previous part of the will, namely, real estate; but I

reminded him that he was using a false premiss, inasmuch as the disposition in favour of Richard was not of real estate, but of money; and the expression of the purpose for which it was given made no difference as to the nature of the subject of the gift. If the expression had been "other estate" instead of "other effects," the argument used in *Jongsma* v. *Jongsma*, 1 Cox, 362, might have been applicable. For, certainly, the words "goods, cattle, and chattels," in the will before us, were in themselves sufficient to pass all the personal estate; and, in order to give some effect to the words "other estate," it would be necessary to hold that realty passed. But the word "estate" is clearly capable, *viribus suis*, of comprehending real estate, while the word "effects" is not. It appears, therefore, to me, that in the present case the word "effects" in the will stands out naked—that is, denuded of all context, and, therefore, inapplicable to real estate. And this is, to the present day, so elementary a point, that it has found its way into the text-books; for in a later work by Mr. HAWKINS on the Construction of Wills—a book, I believe, the learned *Attorney-General* is well acquainted with—p. 35, it is thus written:—"Rule—The word "effects" is confined to personal estate, and does not include real estate unless an intention appear to the contrary." And *Hick* v. *Dring*, and *Haw* v. *Earles*. There is another question which, supposing the Intestate Real Estate Distribution Act, 1867, to be in force, fairly presents itself in the special case for discussion, and it is this—Is the probate, obtained by Mrs. Forrest, the widow, in which none of the lands of which the testator died seised as owner are "limited or excepted," made conclusive evidence by force of the 2nd section of that Act, that the testator did in fact die intestate as to the whole of his real estate? Looking at the 11th section it would seem that the Legislature, by the expressions "probates" and "letters of administration," meant the certificate under the seal of the Supreme Court; for the Judges are, by rules of Court, amongst other things, to prescribe the form of probates, or letters of administration, and by the same section the Legislature views the probates and letters of administration as instruments or means of passing lands. It is highly probable, therefore, that in the 2nd section of the Act the same expressions are used in the

same sense as in the 11th section—that the Legislature, wishing to assimilate the probate or letters of administration to certificates of title under the Real Property Act, and thereby to secure absolute safety to purchasers buying land of personal representatives, meant that no lands, &c., not limited and excepted in the certificate under the seal of the Supreme Court from intestacy must be taken to fall into the testator's intestate estate, and that such certificate should be conclusive evidence of the fact of that intestacy. If it be said that the terms "letters of administration and probate," used in the 2nd section, were used to signify the two documents (certificate and the copy of will annexed to it), and that the Legislature, by the expressions "except as in such letters of administration or probate respectively may be limited or excepted," really meant, except as by the testator's will are devised, I must say that is not the meaning attached to the words "probate," &c., in the 11th section; that "limited or excepted" is a very extraordinary mode of describing a devise; and that such a construction would deprive the section of any effect whatever; for, surely, the devise of real estate in a will is conclusive evidence that the testator did not die intestate as to the land devised. But there is another question of much more importance behind the one I have just stated, the affirmative of which I have in the above statement assumed, and that question is this—Is the Intestate Real Estate Distribution Act, 1867, in force as law in this country? This question does not fairly arise on the special case before us; but, in order to guard myself from being supposed to assent to the view expressed by the *Attorney-General* that the real estate of the testator will not go to his heir-at-law, but will be divided amongst the family, I will suggest a few questions which have for some years pressed heavily upon me. These questions are—1. Do the words "the Governor," in the 13th section of the Act, mean Sir Dominick Daly or the Governor-in-Chief of the Province of South Australia for the time being? The proclamation authorized to be made by the 13th section was made in these words—"Now, I, the Officer Administering the Government of the province of South Australia aforesaid, do hereby proclaim," &c., &c.; and is signed "Henry Ayers, Chief Secretary."

Now, 2. Does Section 13 give authority to the Officer Administering the Government to issue the Proclamation, or is such authority conferred on a Governor-in-Chief exclusively? And, 3. Is the authority conferred on the Governor by the above-mentioned section an authority to exercise an act of legislation? and, if so, can the local Legislature delegate to others any part of its legislative functions? There would appear, also, to be great uncertainty both as to the persons who are to take as to the quantities of interest to be taken by them in the division pointed at by the 2nd section of the Act. As I have said, I do not intend to be understood as deciding any of these questions, although they are very important, as operating upon the right of the testator's widow and children, although they must be decided before the undevised real estate is taken by the heir or divided under the Act; yet as they do not necessarily, from the view I take, call for a decision on the present occasion—not being questions specifically put by the special case—I refrain from giving one. I put my judgment on this ground alone, that the expression "other effects," standing as they do in the will, unaided by any context, are not strong enough to carry real estate. And for the reasons which actuated me, as Primary Judge, on the hearing of the case, I think the appeal should be dismissed with costs, to be paid by the appellant.

STOW, J.—This is an appeal from the decision of the Primary Judge in Equity, whereby on a special case he declared that on the true construction of the will of the testator, the widow, the plaintiff in the special case, under the words "the residue of all my goods, cattle, chattels, and other effects," takes an absolute estate in the residuary personal estate only, and not in the residue of the real estate; and as to the residue of the real estate, that the testator died intestate, and the costs were ordered to be borne by the plaintiff. The plaintiff insists that under the words quoted in the judgment she, on the true construction of the will, takes the residue of the real estate absolutely. A number of cases were quoted, but in no one of them were the words exactly such as those used in the present will; and those cases are therefore valuable

only when they establish or affirm rules which can be applied to the construction of wills; for, as Judges have often observed, the Court cannot construe a will made by one man in one set of words by reference to what another man has said in different words, and under different circumstances. Several rules for the guidance of Courts in the construction of wills have been set up by series of decisions, and amongst them the following, viz.—That the Courts are to construe wills according to the intention of the testator *as expressed by him in the will*, and that intention is to be discovered by reference to the words used according to their legal signification, unless from a perusal of the whole will it should appear that the testator used the words in another sense, and that in case of doubt, and only then, the Court, in order to construe the will, may look at the surrounding circumstances. It is not disputed that the words "goods," "cattle," and "chattels" would not, either singly or altogether, suffice to pass real estate unless used in such a manner as to show that the testator affixed to them a sense larger than their ordinary meaning; and, although in some of the cases Judges have intimated an opinion that the word "effects" should be construed to mean "worldly substance"—*Hogan* v. *Jackson*, Cowp. 299—or, "the results of a man's industry" (per Lord LANGDALE in *Tickfield* v. *Horncastle*, 2 Jur., 610), yet it was not necessary in either of those cases to construe the word; and the later decisions have established it as a rule that the meaning of the word "effects" by itself is confined to personalty—*Camfield* v. *Gilbert*, 3 East, 516; Doe dem *Chilcott* v. *White*, 1 East, 33; Doe dem *Hick* v. *Dring*, 2 M. & Sel., 448; Doe dem *Haw* v. *Carles*, 15 M. & W., 450. The words in the residuary clause of the will are, "my goods, chattels, cattle, and other effects," all of them referring to personalty, and not by their being used altogether having any further or more extended signification. If the testator had, in addition to the word "effects," or instead thereof used the word "estate," "property," or any other term which *might* include realty, I should have been inclined to construe the will so as to give full effect to every word, and to consider that instead of its being restrained in its signification by being joined to words referring to personalty only, the words were cumulative. But

here every one of the words used is, according to the authorities, applicable to personalty unless the meaning is enlarged by reference to other parts of the will. Now, on reading this will, I see nothing whatever to indicate such an intention. There are no words introductory, or otherwise, showing an intention to dispose of all his property. He first devises—using the words "give and bequeath"—a section of land to each of two sons, and then he bequeaths, using the same words, "give and bequeath," a sum not exceeding £100 as a legacy for the benefit of a third son, to be invested in the purchase of land. The *Attorney-General* argued that this was a devise of realty because it was to be converted into realty, but I am unable to follow his reasoning. What the testator gave was money, part of his personal estate, only to be be turned into realty after his death. Having then disposed of two sections of land, being the bulk of his real estate, he goes to his personalty, gives his son a sum not exceeding £100 out of it, and proceeds to give—using that word only—the residue of his personalty to his wife. If the gift, after the devises and bequests, had been of the residue simply, it might have been a question whether he intended to include all his estate, real and personal, not previously disposed of; but what he intended by the residue is shown by the use of the qualifying words "of my goods, cattle, chattels, and other effects," which confines the gift to personalty. The use of the word "bequeath" in the two first clauses, and in the gift of the £100, and his dropping it when he gave the residue, does not raise any presumption as to his meaning either one way or another. The word "other" cannot, in my opinion, enlarge the meaning of the word "effects," which must be confined to personalty, unless, by express words, or by necessary implication, the meaning is extended so as to include realty, and the word "other" raises no such implication. The addition of the words "for her own individual use" certainly does not raise any presumption in favour of the extended meaning being given to the word "effects" so as to include real estate; those, indeed, are words more applicable to personalty than realty. The special case sets out the state of the testator's family, and, to a certain extent, the position of his estate, but fails to give any information as to the value of some land belonging to him at the date of the will, or of the real estate

acquired by him subsequently, and belonging to him at his death; and had the Court been at liberty to take these circumstances into consideration, it might have been necessary to require information on those points. But Courts are not at liberty to take into account extraneous circumstances, such as the state of the testator's estate and family, in order to construe his will, except in cases where his intention as expressed by the will is doubtful; and as the testator in this case has used words which by legal rules are confined to personalty without any qualification, or any expression showing an intention to include realty, I do not think that the Court can look beyond the words of the will. But if we did, there is nothing to lead to the conclusion that the testator intended to leave his eldest son and his children born after the date of the will utterly unprovided for. It was also suggested at the bar that the fact that the testator had left some portion of his real estate to his heir-at-law raised the presumption that he did not intend to leave any part of his real estate undevised. This consideration might be of some weight had the words of the will been doubtful; but inasmuch as the testator has used words descriptive of the residue which, when used by themselves, are applicable to personalty only, and those words are not connected with others which show an intention to give them such a meaning as that they shall include realty, the Court cannot extend the legal meaning of the words by reason of there having been a devise of some realty to the heir-at-law. The fact that the testator had left realty to the heir-at-law has never by itself been held sufficient to enlarge the plain words of a will so as to cause the lands to pass under a gift which, in terms, is applicable to personalty only. And the contrary was held in *Camfield* v. *Gilbert*, 3 East, 516. On the true construction of the will, I am of opinion that the decree of the Primary Judge, that under the words "the residue of all my goods, cattle, chattels, and other effects, for her individual use," the widow took the residue of the personalty, and not the residue of the realty is right in law, and ought to be affirmed. A question was raised on the argument as to the effect of the production of probate under the Act to amend the Law of Inheritance, and it was suggested that the production of a

probate of a will in the usual form was absolute evidence that as to all lands not mentioned and excepted in the official grant of probate the testator was intestate, and that even though by the will referred to in the probate, and a copy of which always accompanies the grant, the lands should be expressly devised. I should be extremely reluctant to decide this point in the manner suggested, which would lead to absurd and inconvenient results, and be productive of manifest injustice; and I should think that the application of the maxim *omnia illata in esse videntur* would render the will part of the probate, and thus that all land devised by the will referred to in the probate would be excepted; but as I have arrived at the conclusion on the construction of the will that as to the lands in question the testator was intestate, an expression of opinion on this other question would be *obiter* only; and, further, the point is not expressly raised by the special case, nor do the facts suggest it, as in the probate referred to the Court may have expressly excepted these lands. The only other question is as to the costs, and although a Court of Appeal may, notwithstanding that the appeal is dismissed on all the other points, and even when as to the costs no question of principle is involved—reverse or vary the decision of the Court below as to the costs, when the appeal on the merits is not used merely as a cover for an appeal on costs—*Attorney-General* v. *Butcher*, 4 Russ. 180—I should be reluctant to interfere as to the costs with the discretion of the Court below. It appears to me, however, that the costs should be borne by the unsuccessful party, as this is not an administration suit, in which Courts frequently give costs out of the estate on questions arising on the construction of the will, but a suit in which the plaintiff seeks to have her claim to the whole residuary real estate affirmed. Nor was the suit rendered necessary by ambiguous or doubtful language of the testator which might induce the Court to allow costs out of the estate—*Cookson* v. *Bingham*, 17 Beav., 262—and the fact that, to save expense, a special case has been presented does not prevent the application of the general rule that costs should go against the unsuccessful party; see *Martin* v. *Martin*, 4 De Gex & Jones, 476. It is said that the parties

concur in the case, and agree that costs should be paid out of the estate. It is a sufficient answer to that to say that some of the parties are infants, and the Court must see that the decision is such as fairly to protect their interests. Were they made to pay or contribute to the payment of the plaintiff's costs or their own in this suit, in which they have succeeded, the Court, in my judgment, would have failed to protect their rights. The appeal, in my opinion, should be dismissed on all points, and with costs.

Appeal dismissed with costs.

APPENDIX.

HANSON, C.J., GWYNNE, J.] [COMMON LAW.

IN THE MATTER OF THE ESTATE OF JAMES WHITTAKER, DECEASED.

THIS case has been already reported (8 S.A.L.R., 45), but counsel having intimated their intention to appeal to the Local Court of Appeals, their Honors consented to give written judgments, which were now delivered as follows :—

HANSON, C.J.—This is a petition by William Whittaker, claiming to be the heir-at-law of James Whittaker, who died intestate in the year 1859, and as such entitled to the real estate of the intestate, of which real estate the Curator of Intestate Estates has charge, under an order of a Judge of this Court, and praying that such order might be set aside, and for other relief. Upon the hearing, a preliminary question was raised by His Honor the Primary Judge, who expressed an opinion that the Court had no jurisdiction to entertain the petition, and His Honor, the late Justice Wearing, agreeing in this view, the petition was dismissed. I did not at the time express my opinion upon the subject, though I certainly did not concur in that of my learned colleagues; but as the Court is now asked for the reason of its decision, I proceed to give my reasons for thinking that the Court had jurisdiction in the matter. The sixth section of the Testamentary Causes Act of 1867 gives to this Court, firstly, the like voluntary and contentious jurisdiction and authority in relation to the granting or revoking probates of wills and letters of administration as were to be exercised in Her Majesty's name by the Court of Probate, established by the Court of Probate Act, 1858; secondly, it gives the same powers in relation to personal estate within this province as the Court of Probate had with regard to the effects of deceased persons within its jurisdiction, and it imposes duties corresponding to these powers; and, thirdly, it provides that this Court shall also have and exercise all the jurisdiction, powers, and authorities by this Act conferred. The question does not therefore seem to me to be concluded by a reference to the jurisdiction of the Court of Probate of England, but to depend upon an examination of the powers conferred by the Act, since this is not a matter with regard either to the granting or revoking of probates of wills and letters of administration; nor has it any relation to personal estate, in which particular the powers conferred upon this Court are the same as those of the Court of Probate. It arises out of the further powers conferred upon the Court in connection with the office of

Curator of Intestates' effects. By section 11 the Governor may appoint a person to be Curator of Intestates' Estates, and until such appointment is made the person appointed under the Ordinance No. 12 of 1848 is to continue to be such Curator; by section 12 the Curator is to have and perform the powers and duties by the Act conferred and imposed upon him, and he is to be under the general superintendence and control of this Court; and by section 13 he is to give security to the satisfaction of the Attorney-General for the collection and due payment of and accounting for all moneys which shall come to his hand by virtue of his office. By section 36, where any person dying intestate and not leaving any heir or lawful representative within the jurisdiction of the Court shall at the time of his death be seised or possessed of any real estate within the said province which may be liable to be injured or the profits thereof lost, unless some care and superintendence be had thereof, the Curator may . . . apply to the said Court or Judge for an order authorizing him to take charge of such estate, which order the Court or the Judge is authorized to make; and the section then goes on to define the powers conferred upon the Curator by such order, and he is to render his accounts and pay all balances in his hands in the manner in the Act directed with regard to personal estate. By section 40 it is provided that no such order shall interfere with or prevent the proving of a will; and by section 41, that upon probate being granted, the powers, duties, and authorities of the Curator shall cease, and he is to hand over moneys and deeds to the person entitled thereto. By section 45, the Court or Judge may direct that any money belonging to any estate in the hands of the Curator may be paid into the Savings Bank; and by section 49, the Savings Bank is to pay over to the Treasury in the first week in January in each year all sums of money which have been in the Bank to the credit of any intestate estate unclaimed for the period of six years next preceding; and by section 50, if any person shall present a petition to the Court, or one of the Judges thereof, praying for payment to him of such sum or any part thereof, and the said Court or Judge shall be of opinion, upon any affidavit or other sufficient evidence adduced, that the person petitioning is entitled to the said sum or any part thereof, the said Court or Judge shall make an order for payment thereof after certain deductions. In this case the petitioner William Whittaker presented his petition, setting forth the death of the intestate James Whittaker in the year 1859, and that at the time of his death he was seised and possessed of real estate within the province, and that on the fifth day of October in the same year the Court, upon the petition of John Brodie Spence (the then Curator of Intestate Estates), did make an order authorizing the said J. B. Spence to collect, manage, and administer the real estate of the said intestate. The petition then alleged that the petitioner was heir-at-law of the intestate, and prayed that the said order of the 5th October, 1859, might be rescinded so far as related to the real estate of the said James Whittaker, deceased; and that the Curator of Intestate Estates might be directed to make out accounts of all the rents, issues, and profits received by him out of the said real estate and of the expenditure of the same, and to hand over the balance of such rents and profits to the petitioner as heir-at-law as aforesaid, and that the Curator do put the petitioner as such heir-at-law in possession of the said real estate, and that the Court should make such other order in the premises as might seem just. And the question is whether the Court had power to entertain the petition and to grant the petitioner any relief under it. From the statement I have already made of the sections of the Testamentary Causes Act it appears that there is no special enactment providing for such a contingency as the present, so that the question has to be decided from a consideration of a general tenor of the

provisions of the Act and of the powers incident to Courts of superior jurisdiction. The first matter to which I would advert is that the order of the Court, which it is now sought to rescind, was in its very nature temporary and contingent, and that it did not possess, and was not intended to affect in any way the rights of the parties who might be interested in the real estate of the intestate. It does not give the Curator any interest in the property, but only a profit out of it in the shape of commission. It merely authorizes him as a public officer, upon whom is imposed the duty of protecting intestates' estates from being lost or wasted, to exercise certain powers with regard to the estate of this particular intestate. The purpose for which these powers are given is that the interests of the heir-at-law may be protected, since he is the only person who will suffer loss by reason of any injury or loss of profits of the realty. The ground upon which the order is made by which these powers are given is that, by reason of there being no heir within the jurisdiction, the real estate is exposed to injury and the profits thereof may be lost; and this is a ground which may cease to exist at any moment after the making of the order, by reason of the arrival of the heir within the jurisdiction. But then if the order is in its nature temporary—based upon the mere absence from the colony of the person entitled to the estate—intended to protect his interests, and limited in a manner to prevent his dominion over his property from being permanently or for any long time affected—it would seem that the Court should have power to rescind it whenever it is satisfied that the reason for making the order no longer exists, and that it should admit for this purpose the same kind of evidence as that upon which the order was made. In this case it happens that the petitioner is a distant relative, and that many years have elapsed since the death of the intestate before his petition was presented; but these circumstances do not affect the question of jurisdiction. If the Court has no power to rescind the order upon the petition of the present petitioner, it would be equally unable to rescind an order upon the petition of an only son who was absent from the colony on the death of his father, and arrived here within a week after the order was made. The order, therefore, in that event, instead of operating for the benefit of the heir-at-law, as is obviously the intention of the Act, would really operate to his disadvantage. It would not only deprive him of the power which he would otherwise have of asserting his own right by entering upon the land, if vacant, or of procuring the attornment of the tenants, if demised, but it would place him in the same position as though the estates had been entered upon by some adverse claimant who had full possession, and whom he could only eject by process of law; and more than this, while he, by reason of his being kept out of the property to which he claims to be entitled, would be probably without the means of litigation, the Curator can employ the profits of the estate in contesting his claim, and is entitled, whatever the result, to be indemnified out of these profits for the expenses he has incurred in throwing obstacles in the way of the claimant. And I may call attention to the fact that in this case there is no conflict of claims before the Court, so that we are not asked to try an action of ejectment upon affidavits. The tenants of the real estate have of course no pretence of title excepting for their respective terms. The Curator has no interest; and though sixteen years have now elapsed since the order was made, there is no one but the petitioner claiming to be heir; and the order which we are asked to make is not one which will bind existing rights, for if any person should ultimately present himself having a better title than the petitioner, that order would not in any way affect his right to bring ejectment or to claim the mesne profits; and we can require security to be given that these latter should be forthcoming. These

considerations, however, though they may tend to show that the jurisdiction might be wisely exercised, do not of themselves show that we have jurisdiction. But this appears to me to be inherent in the very nature of the power conferred upon us. To give a Court power to make an order for a limited and temporary purpose necessarily, as it seems to me, carries with it the power also of rescinding that order when the purpose is served. The power to authorize a public officer to take possession of property and receive moneys to which a third person is entitled, which the Court has exercised in this case, implies, as I conceive, the power to direct him to pay over that money to such third person when his title is shown. It would not, I think, be difficult to find distinct authorities for these propositions, but it appears to me that they do not stand in need of any authority. They are necessary incidents of jurisdiction in any Court, and as such they are implied in the powers given by section 36, and therefore form a part of our Testamentary Causes jurisdiction, under section 6. It may, however, possibly be argued that such a power is implicitly negatived by the provision contained in section 40, which, so far as relates to realty, by referring only to the case of wills, excludes the case of the heir-at-law. But that section does not appear to me to have any such effect. It provides that grant of probate and of letters of administration shall not be interfered with by the making of any such order, and therefore it renders unnecessary any application to the Court to set it aside. The rights of executors and of next of kin to obtain probate and letters of administration by the ordinary process of the Court is maintained, notwithstanding the subsistence of the order; but that affords no argument for limiting the power of the Court over its own orders. If the Act had given express power to the Court to set aside the order in certain specified cases, thus implying that the grant of such power was necessary, and if the case of the heir-at-law had been excepted, there might have been some foundation for such an argument as I am considering; but there is nothing of the sort, so that the omission of any reference to the heir-at-law in section 40 only shows that he is not in a position to treat the order as a nullity, as for the purpose of obtaining probate or letters of administration an executor or next of kin might do, and therefore necessitates and justifies that application to the Court which he has now made. And this view appears to me to receive strong confirmation from the provision in section 50. If there had been no claim under the order in this case in respect of the realty, the profits of the estate would, according to the intention of the Act, have been paid into the Savings Bank; and then the whole of these profits up to the first week in January, 1869 —that is, for nearly ten years from the date of the order—would have been paid into the Treasury for the public use of the colony. But in that case the present petitioner would have had a right to present a petition to the Court or to one of the Judges for payment of these profits to him, and the Court or Judge, upon being satisfied of his title by affidavit or other sufficient evidence, might make an order for payment thereof, upon which order the Governor is to issue a warrant for payment of the same. That special power is needed to enable this Court to make an order which shall bind the Government of this colony is obvious, but it can scarcely be suggested that the grant of this power implies that they have no power over the fund while it remains in the hands of the Curator, for it rather recognizes its existence. The natural inference is that the Legislature assumed that the Court had power over its own orders and over persons to whom it had entrusted special functions, and only gave special powers when they were plainly needed. Otherwise there would be this anomaly, that the Court would have no power over the funds while in the hands of a person who was acting under an authority which they had conferred,

but would acquire this power so soon as the money passed into the hands of persons who were independent of them. It was suggested that the petitioner might bring an action of ejectment against the Curator; but I am unable to understand why he should be compelled to take that course, for the effect of such an action would, I conceive, only be to inform the conscience of the Court. The case of actions of ejectment against a receiver in Chancery stands upon a different footing, for there, probably in every case, the plaintiff would claim adversely to those in whose interests the receiver was appointed, he not being a party to the suit; for if he was, ejectment would be needless; while here the Curator is appointed in the interest of the heir, which the petitioner claims to be, and I think it would be contrary to the very object for which an order to take charge of the real estate is made that the Curator should be allowed to place himself in the position of an adverse claimant to the person whose interests he is appointed to protect. The Curator has possession of the lands and of the profits for the benefit of the heir-at-law, and he holds them, as it seems to me, subject to the order of the Court. I think that there is nothing in the circumstance that the subject-matter of the order is realty to oust the Court of the jurisdiction which I have endeavoured to show follows from the very nature of the order; and I am therefore of opinion that it had jurisdiction to hear and grant the prayer of the petition.

GWYNNE, J. — This is a petition presented to this Court in its Testamentary Causes jurisdiction by William Whittaker, of Glenelg, in this province, coachman. The petitioner in his petition states that James Whittaker, late of Norwood, in the said province, died on or about the 5th day of August, 1859, intestate, and seised of real and personal estate in the said province; that by an order of this Court, made on the 5th October, 1859, under and in pursuance of the Ordinance No. 12 of 1848, the then Curator of Intestate Estates was authorized to collect, manage, and administer the personal estate, and to collect the rents and manage the real estate of the said James Whittaker, deceased; that Mr. Henry Alfred Wood is now the Curator of Intestate Estates in this province, and is, as such, in possession of the real estate which was of the said James Whittaker, deceased; and the petitioner then sets out certain facts, which, he contends, show that he is the heir-at-law of the said James Whittaker, deceased. The 15th paragraph of the petition is as follows:—"Your petitioner heretofore, and about the fourth day of June, 1864, commenced an action of ejectment to recover possession of the said real estate, but your petitioner's said action was stayed by an order of a Judge of this Court, on the ground that, being under the jurisdiction of this Court, and in the management of the Curator, your petitioner's proceedings ought to be by way of petition to the Court in its ecclesiastical jurisdiction." The prayer of the petition is that the said order be rescinded so far as concerns the real estate of the said James Whittaker, deceased, within this province, and that the Curator be directed to make out accounts of all the rents, issues, and profits received by him, and of the said real estate, and of the expenditure of the same; and to hand over the balance of such rents and profits to your petitioner, as heir-at-law of the said James Whittaker, deceased; and also that the said Curator do put the petitioner in possession of the said lands and premises, and real estate. The petition is intituled "Testamentary Causes Jurisdiction," and came on for argument before this Court on the twenty-fifth day of March, 1874, the Court consisting of the Chief Justice, myself, and the late Mr. Justice Wearing, and was dismissed (certainly so far as my own individual opinion proceeded) on the ground that the Court had no jurisdiction to decide on the title to real

estate on petition at all, and unquestionably not in the exercise of its testamentary jurisdiction. (See the report of the hearing, S. A. Reports, 1874, p. 45). Before going into the more materjal questions raised on this petition, I would like to observe on the extraordinary statement made by the petitioner in the 15th paragraph of his petition. I would ask, in answer to that statement, why was the Full Court not moved to set the order there referred to aside? The right to bring this action against the Curator, or any one else, belonged to the petitioner, *ex debito justitiæ*, and such an order, if made, was as invalid as any order would be if made in favour of the Sheriff stopping any action against him, on the ground that he was in this province an officer of the Court. Actions of ejectment are constantly brought against receivers of Equity, and it was never conceived that the Court would interfere to stay such actions; on the contrary, the Court interferes only for the purpose of preventing improper defences. Thus in the case of *Swaby* v. *Dickan*, 5 Sim., 629, the Court said:—"It is improper for a receiver as a guardian to do without the sanction of the Judge any act which may involve the estate in expense." And Mr. Daniels, in the 2nd volume of his Practice, p. 597, 5th edition, says—"Upon this ground if any ejectment is brought against a receiver he should not defend the action without the sanction of a Judge previously obtained." The Court by its officer, the Curator, holds the real estate of which the deceased, James Whittaker, died seised and intestate, in trust for the person who, by the procedure called an action of ejectment, proves by formal and legal evidence himself the heir-at-law. I cannot help thinking, and I hope that there is some mistake as to the order referred to by the 15th paragraph of the petition. It was not produced to the Court on the hearing, but even assuming that a Judge of this Court did unadvisably make such an order, and that through the negligence of the petitioner's legal adviser or other cause, it was not brought before the Full Court and set aside, can that circumstance form a ground to the petitioner for asking the Court to hand over to him the property perhaps of another without any proper legal enquiry into his title to it? I will now proceed to the consideration of the more important questions raised. The order of the 5th October, 1859, which the petitioner asks this Court to rescind, was made under the authority of the Local Ordinance, No. 12 of 1848, intituled "An Ordinance for the better preservation and management of the estates of deceased persons in certain cases." The Act contemplates principally cases where no suit or action can be instituted, and invests the Court with a novel jurisdiction. The Court or a Judge is enabled without suit to make certain orders—one which constitutes the Curator as respects the personal estate, a *quasi* administrator, and another as respects the real estate a *quasi* receiver. It is contemplated by the Act that these orders shall be separate and distinct; the Curator is to proceed actually to administer the personal estate as though he was an executor or administrator, but subject to the proviso at the end of the second section of the Ordinance, that on a will being proved by letters of administration being obtained by any other person, his powers all cease. But except, as presently mentioned, he cannot deal with any one in respect of the personal estate, unless and until the person claiming the estate has clothed himself with the character of executor or administrator. The excepted cases to this general rule apply to very small estates only, and are contained in the twelfth section of the Ordinance, and applying the principle *exceptio probat regulam*, it is clear that until the claimant assume one or the other of the above characters (which he could only do by proof of his title in the Ecclesiastical side of the Supreme Court), both the Court and the Curator must treat him as a stranger. As respects real estates, the Curator is not administrator, but merely to manage

it. And it is clear to my mind that it was not the intention of the Legislature to interfere with the general jurisdiction over either subject, the personal estate or real estate, but that as well after the ordinance as before it real estate was to be governed according to the nature of the particular case, either by a Court of Equity or by a Court of Law, and the personal estate by the then Ecclesiastical jurisdiction of this Court. I have more particularly alluded to this matter in a subsequent part of this judgment. At the time this order was made (in October, 1850) the nature and extent of the several jurisdictions of this Court were defined by the Local Act, 7 William IV., No. 5, and the concurrent Act, No. 31 of 1855-6, and by a reference to these Acts it will appear that the Ecclesiastical jurisdiction did not extend to real estate. It would be well to consider what the law in England was at the time alluded to (in October, 1859) with regard to the *factum* and construction of wills, notwithstanding the case before the Court is a case of heirship. In 1859 the Ecclesiastical Courts had jurisdiction to determine the *factum* of the will, so far as related to the personal estate affected thereby, but they had no general authority to put a construction on the will, even as respected personal estate; that function devolved on the Equity Courts. As to the real estate, subject only to certain qualified interposition of the Equity Courts, the Common Law Courts, and the juries, each acting within its fitting province, were alone the judges, both of the *factum* and construction. The question of will or no will was tried before a jury at *Nisi Prius*; questions of construction by the Court *in Banco*. With the question of *factum* the Ecclesiastical Court had no concern. At the time I am speaking of—October, 1859—the law was precisely the same in all the above respects in South Australia. Then it became necessary to consider the effect of the Testamentary Causes Act, 1867. First of all, it repeals the law relating to the Ecclesiastical jurisdiction of the Courts, and transfers all such jurisdiction to the Testamentary Causes Jurisdiction. It then proceeds to repeal the Ordinance No. 12 of 1848, but its repealing effect upon that Ordinance has this qualification—I quote the language of the Ordinance so far as applicable to the present case:—"Except so far as may be necessary for supporting the validity of any proceeding heretofore had under the said Ordinance, and all orders heretofore made by the Supreme Court under the powers therein contained, shall be as valid and effectual, and all bonds, &c., shall be as valid and shall have the same force and effect for all purposes as if this Act had not been made." The third section concludes with these words:—"And all proceedings pending in the said Court in its Ecclesiastical Jurisdiction at the time of the passing of this Act" (it was assented to on the 19th December, 1867) "shall be proceeded with and completed as nearly as circumstances will allow under the provisions of this Act." Now it appears clear that the order made in October, 1859, authorising the Curator to manage the real estate of the deceased James Whittaker, and which, as an instrumental end, the petitioner seeks to rescind, is still in full force and effect; but whether the jurisdiction over this order was transferred to the Testamentary Causes jurisdiction will depend on the construction to be put upon the four last lines of the third section of the Testamentary Causes Act. The order sought to be set aside was made and concluded some eight years before the passing of the Testamentary Causes Act, and was as complete and final as any judgment of the Supreme Court could be, and therefore it cannot be said that it was a "proceeding pending" at the time of the passing of the Act. Again, the proceeding, even if regarded as pending, was pending in the Supreme Court as a proceeding under the Ordinance No. 12 of 1848. The jurisdiction conferred

by it can be exercised by a single Judge, from whose decision there is no appeal, and the word "ecclesiastical" does not once occur in it. On the other hand, as I have already remarked, the nature and extent of the Ecclesiastical jurisdiction of the Court at the time of making the order was defined and its procedure settled by the 7 Wm. IV. cap. 5, and by 9th, 10th, 11th, 12th, 13th, and 14th sections of No. 31, 1855-6, and is conferred on the Full Court, but not on a single Judge. It follows, therefore, that the proceeding under this order cannot be proceeded with and completed as nearly as circumstances will allow, nor, indeed, in any manner under the provisions of the Testamentary Causes Act. It appears to me that the order was originally made by the Supreme Court, not, so far at any rate as respects real estate, in exercise of any Ecclesiastical jurisdiction, but of the peculiar jurisdiction conferred by the Ordinance. There is no express mention in the Ordinance of any special jurisdiction; but it is reasonable to suppose, looking to the nature of the subject-matter, that the Legislature intended orders obtained for the administration of the personal estate should be under the Ecclesiastical jurisdiction, and by parity of reasoning that orders obtained for the management of the real estate should be under the Equitable jurisdiction. And, as respects real estate, this view is confirmed by the machinery to be used, and the powers of a receiver to be conferred on the Curator. It is to be observed that in one particular respect the power of the Court under the Testamentary Causes Act of 1867 is larger than that possessed by it under its former Ecclesiastical jurisdiction. The proof of a will relating to real estate has under certain conditions become a matter of Testamentary jurisprudence; and it may be said with truth that in the case of a will of real estate the Supreme Court in its Testamentary Causes jurisdiction has now the power to decide incidentally upon the title of real estate, for by sections 22, 23, 24, and 25 the will as between a devisee and the heir-at-law can now in solemn form be proved in the Testamentary jurisdiction of this Court, and when so proved it is proved once for all, and cannot be afterwards questioned in any Court whatever. The reasons of the alteration of the law are obvious, and I need not on an occasion like the present refer to them with any particularity. But even in this altered state of the law the common-law principle—certainly as old as Magna Charta—is preserved, for the question *devisavit vel non* must (by the seventeenth section) be determined by a Jury if the heir-at-law applies to the Court for that purpose. But the present case is not one arising out of a devise by will. It is one arising out of an heirship, and therefore not a Testamentary cause either here or in England. The petitioner asks the Court to set aside the order on the ground that he is heir-at-law of James Whittaker, deceased. But the question can only be tried by a Common Law Court with a Jury, that being the only mode known to the law and Constitution of England and of this province for the determining it. The procedure, however, in the Equity jurisdiction is by bill, and in the Common Law jurisprudence not by petition and affidavit but by an action of ejectment. It was contended by the learned counsel for the petitioner that this Court has the power to rescind the order of October, 1859. Now, putting aside all the difficulties which accidentally attach to this particular order in consequence of the repeal of the Ordinance under which it was made, and the clumsy machinery used to continue the duties of the Curator on the one hand, and the powers of the Court on the other hand over that order, to which I have already to some extent more particularly alluded; and for the sake of argument assuming that the order in question was made under the present Act (the Testamentary Act), how would matters stand? Even under that supposition the present case would not be cognizable in the

Testamentary Causes jurisdiction. As I have previously written, this is a case of the descent of real estate from the ancestor to the heir-at-law and the heirship. In a word, the case of the petitioner is not a Testamentary cause; and even on the supposition that the order had been made under the Testamentary Causes Act, 1867, we could no more rescind the order, except on the ground of fraud or irregularity, neither of which grounds in the present case exists, than we could any other solemn judgment or order of the Court. But even if the Court had power to rescind the order it would not exercise that power, for the order is the basis on which many rights, duties, and obligations rest. For instance, how would such an act as the rescission of the order affect the tenants who have leased parts of the real estate under the Curator? Nor would the Court so far forget its dignity as even in appearance to become a partisan of the petitioners, and do that by an underhand act which it has no power to do directly. For let learned counsel for the petitioner say whatever his ingenuity may suggest, the question comes to this—Is the petitioner the heir-at-law? That question is still open, and we cannot rescind the order, and so give the petitioner possession of the property, without assuming that question in his favour, which it would be highly improper for us to do. The term improper is much too mild. As I have above pointed out, the Court has no power to order the Curator to hand over the personal estate of above £50 to any one unless that person assumes the status of personal representative of the deceased; and, *a fortiori*, the Court has no power to hand over the realty unless the claimant shows by competent proof in the appropriate procedure (trial by Jury) he possesses the status of heir-at-law. To hand this large property over to the petitioner, as prayed for by him, would in my belief be opposed to all principle and authority, and an outrage upon administrative justice. The learned counsel based his argument principally on the twelfth section of the Testamentary Causes Act, 1867, and contended that as the Curator was under the control of the Court we could order him on petition to hand over the property. What I have already written is, to my mind, an absolute answer to this argument. But I would further observe in respect to it that true it is the Curator is an officer of the Court; so is the Sheriff, and so is the learned counsel himself; but that is no reason we should attempt to force on any of them an illegal order. But even assuming for a minute that we had such jurisdiction as contended for by the petitioner's counsel, we certainly had the power under the seventeenth section of the Act to direct the truth of the question of fact—heir or not heir—to be determined by the verdict of a special or common Jury; and that was what I and my learned colleague, the late Mr. Justice Wearing, on the hearing of the petition, expressed our wish should be done. Having brought to the consideration of this case all the attention I can command, I am of opinion, without the shadow of a doubt, that we cannot even hear this petition, much less comply with its prayer. I think, however, the Curator's costs incurred in this matter should be allowed him in his accounts.

On appeal to the Local Court of Appeals, the judgment of the Supreme Court was, on the 6th December, 1875, reversed.

In the matter of "The Companies Act, 1864," and "The Companies Amendment Act, 1870-1," and in the matter of "The Talisker Mining Company, Limited."

BANK OF SOUTH AUSTRALIA v. ABRAHAMS.

IN this case, which is reported in 7 S.A.L.R., 167, on appeal to the Privy Council, the decision of the Full Court was reversed and that of the Primary Judge upheld.

The following judgment of their Lordships was delivered on the 16th March, 1875, by the Lord Justice JAMES :—

"The question in this appeal is, whether a power in a deed of settlement of a joint stock company authorizing the Directors to mortgage or charge the property of the company, gives them authority to include in such mortgage or charge future calls, or, in other words, the unpaid capital of the company. There was a difference of opinion amongst the Judges of the Supreme Court before which the question was brought on appeal from the order of the Primary Judge. The majority were of opinion that the word "property" included future calls, and that the law had been so settled in this country by *Liskman's* case, a Vice-Chancellor's decision, cited from the *Law Times*. The dissentient Judge who had made the order then under appeal admitted that this was so, but thought that the context of the deed excluded that construction in this particular case. It is much to be regretted that the attention of the Judges was not called to *Stanley's* case, 4 DeG., J., & S., 407; S.C., 33 L.T., 536, a decision of the Court of Appeal which has been followed in other cases, and has been cited and referred to in every text-book as the leading case authoritatively settling the rule of law. In that case, the words of the power were "property and funds," and it was held that a charge on future calls was *ultra vires* and void. It is impossible to distinguish that case from the one under appeal, and the contention on the part of the respondents was that their Lordships, or the ultimate tribunal of appeal, should review that decision, and overrule it, as not being a correct exposition of the law. Even if their Lordships had any doubt as to that decision, they would not have felt themselves warranted in disturbing a rule which has been uniformly (with the exception of *Liskman's* case, 23 L.T., N.S., 759; S.C., 19 W.R., 344) assented to and acted upon in this country. And it is to be noted with respect to *Liskman's* case, that, although it was after *Stanley's* case had been decided by the Court of Appeal, the Vice-Chancellor does not appear to have referred to that case, and *Liskman's* case has not found its way into the authorized reports or text-books. The decision in *Stanley's* case appears to be based on very intelligible and reasonable grounds. The capital not paid up is, according to the usual form of deeds of settlement (the form in this case), only *sub modo* the property of the company. The company has no absolute right, and the shareholder is under no absolute liability to pay. The right only arises if and when calls are made by the Directors in the exercise of a discretion within limits both of time and amount prescribed by the deed. The due making of the call by the resolution of a Board of Directors is an essential condition precedent. It was held, therefore, in *Stanley's* case, that the general words "power to charge property and funds" could not be intended to create a charge. It would either leave it optional with the Directors to give it effect by making calls which would be nugatory, or it would entirely alter the provisions

of the deed as to calls, which is not to be implied. Their Lordships see no ground for dissenting from that view. They may add that the right of the company is, strictly speaking, more in the nature of power than of property; and, although that which a man has power to make his own may be charged, as well as that which is actually his, it requires apt and proper words, or a sufficient context, to have this effect. In the particular case before them, the power was contained in a deed of settlement of a company which, at the time, was a partnership with unlimited liability; and, although they afterwards availed themselves of the power to register as a company with limited liability, the construction of the deed must, of course, be the same as it originally was. In such a partnership, the provisions as to calls and capital are merely the internal arrangements and bargains of the partners as to raising money for the concern, and it would be a strange thing to pledge these as an additional security to creditors, who had the whole fortune of every shareholder by law pledged to them. Their Lordships will humbly recommend to Her Majesty that the appeal be allowed, and that the order of the Supreme Court complained of be discharged, and that in lieu thereof there be an order dismissing the appeal to that Court, and affirming the order of the Primary Judge with costs.

"The appellants are to have their costs of the appeal, to be paid by the respondents, Breakell and Gordon."

"The official liquidator will take his costs of the appeal out of the estate."

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ACT No. 8 of 1865-6.—*Information—Crown Ranger*—Certiorari. Informations under Section 2 of Act No. 8 of 1865-6 should be laid by the Crown Ranger, and *certiorari* will lie to quash a conviction on an information laid by any private person.

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ADELAIDE WATERWORKS ACT, 1863.—*Section 58—Agreement to supply water for "all purposes"—Meter—Estoppel—Right of Collector to sue.* By an agreement made, or purporting to be made, pursuant to Section 58 of the Adelaide Waterworks Act of 1863, the Commissioner of Waterworks agreed to supply water "for all purposes," such water to be paid for at a certain rate for every 1,000 gallons, as shown by the meter; the Commissioner further undertaking, on notice given by the defendant that such meter was out of repair, to repair the same, and to allow to the defendant, free of charge, 1,000 gallons for every 1s. 6d. of the water-rate levied in respect of defendant's premises.

On action brought by the Collector for the Commissioners,

Held—Per GWYNNE, J.—That moneys payable under a special agreement are not such moneys as the Collector is empowered by Section 76 of the Act to sue for.

2. That the Commissioner had no power to enter into an agreement to supply water "for domestic and other purposes," but for "purposes other than domestic" only, and that the agreement was, therefore, *ultra vires*.

3. That though the defendant was estopped from disputing the correctness of the meter, he was not estopped from questioning the accuracy of the plaintiff's reading of the same.

Per HANSON, C.J.—That, in substance, the agreement distinguished between water to be used for "domestic" and that to be used "for

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other purposes," the allowance free of charge being the quantity assumed by the Act and the agreement to be that likely to be used for domestic purposes, and that the agreement was therefore within the meaning of the Act.

2. That the Collector was entitled to sue for same under Section 76.

DAVIS v. BAGOT. 6

ADMINISTRATOR.—*Commission—Real Estate.* Per HANSON, C.J., and STOW, J.—GWYNNE, J., *dissentiente*—Commission is allowable under the Testamentary Causes Act to an Administrator on the Real as well as on the Personal Estate administered by him under Letters of Administration.

IN THE GOODS OF ALEXANDER PATTERSON, DECEASED. 92

AGENT.—See COMPANY.

AGREEMENT.—*Breach—Warranty of Title.* The plaintiff having obtained from the Commissioner of Crown Lands of Western Australia a letter stating that in accordance with the terms of arrangement the permission to work guano on a certain island, portion of the Western Australian Territory, would be transferred to him, entered into an agreement with the defendant whereby in consideration of the plaintiff depositing his right or royalty to work the island and assigning to him one-half of his (the plaintiff's) interest therein, the defendant agreed to find vessels and capital for the purpose of bringing the guano to market, and also that a certain vessel expected to arrive in December, 1874, should be the first vessel dispatched. The purchase-money of this vessel was to be retained by the defendant out of the proceeds of sale of guano. This vessel instead of coming to Port Adelaide was sent to New Zealand.

Held—That there was evidence to go to the jury, that the right or royalty referred to in the agreement was the letter above-mentioned and not a formal grant. And also evidence that the vessel was the property of the defendant, on whom the *onus* lay to show that its non-arrival was not caused by his acts.

HOWLETT v. PRIDMORE. 169

——————TO SUPPLY WATER FOR "ALL PURPOSES." —See ADELAIDE WATERWORKS ACT.

——————See REAL PROPERTY ACT, 1861 (2).

APPEAL.—1—*Bailiff of Local Court—Attorney—Party to Cause.* A Bailiff of a Local Court who has seized goods under execution, at the instance of the judgment creditor or his attorney, may, on such goods being surrendered in consequence of notice of appeal having been given, forthwith sue such judgment creditor for his expenses, without awaiting the event of the appeal.

The client, and not the attorney, is liable for fees payable to a bailiff, acting not by virtue of a special employment, but in the execution of his duty.

O'HALLORAN v. COLGAN. 95

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APPEAL.—2.—*Contract—Time for payment—Receipt of Bill of Exchange.* A contract was entered into for the sale and purchase of stone at a certain price per foot. The contract was contained in certain letters, in which no mention was made of the mode or time of payment. Portion of the stone having been delivered, the plaintiff wrote to the defendant for a payment on account. In reply, the defendant sent plaintiff a bill, "hoping that it would suit," and a few weeks later wrote, stating that he presumed from the fact of not having heard from the plaintiff, that the latter had succeeded in discounting the bill. As a matter of fact, the plaintiff had not so succeeded, but did not return the bill to the defendant.

On action by the plaintiff for the portion of the stone delivered and in respect of which the bill had been given,

Held—That there was evidence—

1. That the stone was to be paid for on delivery.

2. That the plaintiff had received the bill not in payment, but for discount.

Held, also—That the above were questions of fact, not of law, and therefore for decision by the Court below.

BUNDEY v. BOND. 21

———3.—*Will—Construction—Effects.* A testator by his will, after certain specific devises and bequests to his children, continued thus—"And to Susannah, my beloved wife, I give the residue of all my goods, cattle, chattels, and other effects, and I appoint her my sole executrix."

Held—That the residuary realty did not pass by the above residuary bequest.

Decision of the Primary Judge, 9 S.A.L.R., affirmed.

Per GWYNNE, J., *Quære*—1.—Does the word the "Governor" in the 13th section of "The Intestate Real Estates Distribution Act, 1867," mean the Governor at the time of the passing of the Act, or the Governor for the time being?

2.—Can the Officer Administering the Government exercise the power of issuing proclamation conferred on the Governor by such 13th section?

3.—Is the authority conferred on the Governor by such 13th section an authority to exercise an act of legislation; and, if so, can the Local Legislature delegate to others any part of its legislative functions?

4.—Is the above Act in force, the proclamation fixing the day from which the same was to take effect having been issued by "the Officer Administering the Government?"

FORREST v. FORREST. 222

———4.—See INSOLVENT ACT, 1860 (1).

———5.———— (2).

ARTICLES OF ASSOCIATION.—See COMPANY.

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ASSOCIATION, ARTICLES OF.—See COMPANY.

———————— MEMORANDUM OF.—See COMPANY.

ATTORNEY.—See APPEAL.

BAIL.—See INSOLVENT ACT, 1860 (2).

BAILIFF OF LOCAL COURT.—See APPEAL (1).

BILL OF EXCHANGE, RECEIPT OF.—See APPEAL (2).

BILLS————————See COMPANIES ACT, 1864.

BREACH.—See AGREEMENT.

CANCELLATION OF CERTIFICATE.—See MERCHANT SHIPPING ACT.

CERTIFICATE, CANCELLATION OF.————————

CERTIORARI.—See ACT No. 8 OF 1855-6.

CHEQUES OR ORDERS.—See COMPANIES ACT, 1864.

COLLECTOR, RIGHT OF TO SUE.—See ADELAIDE WATER-WORKS ACT.

COMMISSION.—See ADMINISTRATOR.

COMMIT AND FINE, POWER TO.—See CORONER.

COMMON LAW POWERS.—See CORONER.

COMPANIES ACT, 1864.—*Cheques or Orders—Bills of Exchange—Notice of Dishonour.* The plaintiff, a storekeeper, was in the habit of receiving from miners in his neighbourhood, in payment for goods, certain documents, signed by the captain and purser of the mine and addressed to the Secretary, and of sending these to his bankers, who at first treated them as cash, but subsequently gave notice to the plaintiff that they would no longer receive them as cash, but only for collection.

One batch of these documents was dishonoured, but no notice of dishonour was given by the Bank to the plaintiff, and it was not until after a second batch of such documents had been received by the plaintiff and forwarded to the Bank, and not until the mine stopped payment, that the plaintiff learnt from the defendants that the first batch of documents had been dishonoured.

On the trial the above documents were treated by counsel and in the direction of the Chief Justice as cheques or orders for payment of money on which the Company was liable, and the verdict of the jury was founded on that direction.

Held on appeal—That the documents were bills of exchange, on which—they not having been drawn for and on behalf of the Company, nor accepted by the Secretary—the Company was not liable, and that as this view altered the conditions on which the liability of the defendants depended, there must be a new trial.

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Quære—Whether the Company would have been liable if the bills had been accepted by the Secretary?

LEVINE v. THE BANK OF ADELAIDE. 119

COMPANY (1).—*Articles of Association—Memorandum of Association—Preferential Shares.* Section 6 of the Articles of Association of a Company empowered the Directors, if authorized by special resolution as therein mentioned so to do, to increase the capital of the Company by the issue of shares giving a right to preferential dividends over such capital. Section 56 of the same Articles provided that dividends should be divided *pro rata* amongst the shareholders.

The Memorandum of Association was silent on the subject of preferential shares.

On action for calls due on preferential shares issued pursuant to Section 6,

Held—That the issue of such shares was not *ultra vires*, and that the defendant was not entitled to a nonsuit on that ground; and that Sections 6 and 56 of the Articles were not inconsistent.

THE BURRAWING COPPER MINING COMPANY (LIMITED) v. HARVEY. 14

————(2)—*Principal—Agent*—Onus probandi. The defendant, being Secretary to the Yam Creek Gold Mining Company, telegraphed the plaintiff to wind up the affairs of the Company.

There was subsequent correspondence between the parties, the plaintiff sometimes addressing the defendant personally, at others as Secretary to the Company; and the account was opened in the books of the plaintiff in the name of the Company.

There was no evidence that the defendant had not authority so to employ the plaintiff on behalf of the Company.

Held—That the defendant was not personally liable.

That the *onus* of proving that the defendant had not authority rested on the plaintiff.

JONES v. SCOTT. 174

CONDONATION.—See DISSOLUTION OF MARRIAGE.

CONSTRUCTION.—See APPEAL.

———————— WILL.

CONTRACT.—See APPEAL.

CORONER, POWER TO FINE AND COMMIT.—*Common Law Powers—Court of Record.* A Coroner in South Australia has all the common law powers of a Coroner in England; is entitled, when holding Court as Coroner, to fine for contempt and commit on default in payment, and is not liable to an action for such fine and committal.

Semble—That a Coroner's Court is a Court of Record.

COMYN v. WILLSHIRE. 161

COSTS.—See DISSOLUTION OF MARRIAGE.

————See LANDS CLAUSES CONSOLIDATION ACT, 1847.

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COUNSEL, ACQUIESCENCE BY, IN JUDGE'S DIRECTION. —See NEW TRIAL.

COURT OF RECORD.—See CORONER.

CROWN RANGER.—See ACT No. 8 OF 1855-6.

CUSTOM OF WAREHOUSEMEN.—See INSOLVENT ACT, 1860.

DAMAGES.—See REAL PROPERTY ACT, 1861.

DEBTS.—See INSOLVENT ACT, 1860.

DELIVERY.—See STORAGE RECEIPT.

DEMURRER.—See GENERAL DEMURRER.

DIRECTION, JUDGE'S.—See NEW TRIAL.

DISHONOUR, NOTICE OF.—See COMPANIES ACT, 1864.

DISSOLUTION OF MARRIAGE.—*Condonation—Revival—Costs.* In a suit for a dissolution of marriage heard before a Judge without a jury the Judge found the following facts:—

That some two years prior to the filing of the petition the respondent was living with another woman as his wife—That the petitioner, knowing this, continued to cohabit with her husband—That subsequently she left her husband, and lived for two years with a friend, at the end of which time the petition was filed—That subsequently to the filing of the petition the respondent visited and cohabited with the petitioner, she knowing at the time that he was living with and intended to continue his intercourse with another woman.

Held—That the former adultery and cruelty were not revived by subsequent intercourse by the respondent with the woman above referred to, the renewal of such intercourse having been contemplated by the petitioner when the former offences were condoned.

Where the petition is dismissed under issues presented to the Court, but owing to investigation order by the presiding Judge, petitioner's costs will be allowed.

MAY v. MAY. 140

DIVISION VI.—See INSOLVENT ACT, 1860.

EFFECTS, See APPEAL

———— WILL.

EQUITY ACT, 1866-7.—*Revivor—Order—Service.* Under Section 46 of the Equity Act, 1866-7, where a suit is abated by reason of the insolvency or death of one of the defendants, a common order to revive the suit may be obtained, and such order or any notice thereof need not be served on the other defendants to such suit.

ST. GEORGE v. BURNET AND ANOTHER. 109

ESTOPPEL.—See ADELAIDE WATERWORKS ACT, 1863.

———— NEW TRIAL.

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FALSE PRETENCES.—See INSOLVENT ACT, 1860 (1).

FINE AND COMMIT, POWER TO.—See CORONER.

GENERAL DEMURRER.—*Special.* A declaration against a District Council for damages occasioned through obstructions allowed to remain on a road stated that the road was under the care and management of the District Council, but did not aver that it was a "district road" within the meaning of the District Councils Act of 1858.

General demurrer on the ground of such non-averment overruled.

Quære—Whether the objection would have held good on special demurrer?

GRAHAM v. THE DISTRICT COUNCIL OF SADDLEWORTH. 159

HABEAS CORPUS.—See INSOLVENT ACT, 1860 (3).

INFORMATION.—See ACT No. 8 OF 1855-6.

INSOLVENCY.—See STORAGE RECEIPT.

INSOLVENT ACT, 1860, (1).—*Section* 121—*Appeal—False Pretences.* An insolvent was imprisoned by the Commissioner of Insolvency for having contracted a debt with A by means of a false statement that he did not owe anybody else anything, whereas in fact he owed B £204.

There was no evidence elicited at the last examination of the existence of the debt to B at the time when the debt to A was contracted beyond the schedules previously sworn to by the insolvent, and which showed that the insolvent was, at the time of his insolvency, indebted to B in the sum of £311, incurred between 1873 and 1875, and was in May, 1874, the time of the alleged misrepresentation, indebted to B in the sum of £204.

The false pretence charged was that the insolvent having previously purchased certain cattle from the principal of A, an auctioneer, told A not to put these cattle up for sale, and on the auctioneer demurring made the false statement charged; and A deposed that in consequence of such statement he allowed the insolvent to take the cattle so previously purchased and to purchase other cattle during the sale, for the purchase-money of all which cattle the insolvent gave an acceptance to A.

Held—That there was sufficient evidence of the existence of the debt to B at the time A's debt was contracted, and that the Commissioner was justified in assuming that the false statement operated and was intended to operate on A's mind during the sale and induced him to give credit.

IN *re* KING. 146

——————— (2).—*Debts—Interest.* Under Division VI. of the Insolvent Act, 1860, unless the contrary is declared by the deed, the debtor is not entitled to the surplus until the creditors have received interest on their respective debts.

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Per HANSON, C.J., *semble*.—That if the contrary were so declared the creditors would not be entitled to interest.

Per GWYNNE, J.—That such a contrary declaration would invalidate the deed.

A deed, in order to be valid under Division VI. of the Insolvent Act, 1860, must contain a complete *cessio bonorum*, except as regards articles of household furniture, wearing apparel, and necessaries to the value of £30; and the words in Section 180 "unless the contrary be declared by the deed," do not warrant any departure from the fundamental principles of the Insolvent Act.

A deed of assignment for the benefit of creditors, purporting to be made in pursuance of Division VI. of the Insolvent Act, 1860, conveyed and assigned all the real and personal estate of the debtors to trustees, "to the intent that the said real and personal estate shall be held by the said trustees by virtue hereof, subject to the provisions of the Insolvent Act, 1860, with respect to arrangements between debtors and their creditors by deed . . . . And to the further intent that they (the said debtors) shall be freed and discharged from all the debts of their creditors . . . . And after full payment of all such costs, charges, and expenses as aforesaid, it shall be lawful for them (the said trustees) to apply and apportion the residue of the said moneys in manner directed in Division VI. of the Insolvent Act, 1860, relating to arrangements between debtors and their creditors by deed. And after payment of all such debts, costs, charges, and expenses as aforesaid, it shall be lawful for them (the said trustees) to pay the surplus (if any) to the said debtors."

The deed also released the debtors from their "debts."

Held—That though the debts from which the debtors were released were the amounts ascertained at the date of the deed, these debts not being extinguished, their incidents—and amongst others, interest—were only suspended; and the very fact that the debtors were released from those debts implied an intention that there should be a corresponding transfer to the creditors of all the appurtenances of such debts.

That "payment of such debts" means such a payment as would result from the due apportionment and application of the moneys in such a manner as to afford the creditors all the benefits to which they would be entitled under any of the provisions of the Act; and consequently, that there was nothing declared in the deed indicative of any intention to negative the right of creditors to interest.

Per GWYNNE, J.—That if there had been any such declaration, it would have invalidated the deed.

IN *re* LEVI. 36

INSOLVENT ACT, 1860.—(3).—*Sec. 125.*—Habeas Corpus—*Order—Warrant—Scienter—Bail—Appeal.* It is not a necessary ingredient of the offence of obtaining forbearance by means of false pretences within the meaning of Section 125 of the Insolvent Act, 1860, that such pretences should have been false within the knowledge of the insolvent, or made with intent to defraud, nor need the order or

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warrant for imprisonment aver such knowledge or intent. (*Ex parte* Fischer, 8 S.A.L.R., 57, overruled.)

The warrant for imprisonment under the above Section need not set out all proceedings prior to the order, which is in itself sufficient authority for the issuing of the warrant.

The Supreme Court has no jurisdiction to admit a prisoner in custody under an order of the Commissioner of Insolvency to bail until appeal entered.

IN *re* KING. 134

INSOLVENT ACT, 1860.—(4).—*Trover—Payment—Order and Disposition—Custom of Warehousemen.* A purchased from the plaintiffs thirty bales of cornsacks—the purchase-money being paid by three bills of exchange, payable at different dates—and stored them in his name in a free warehouse at Port Adelaide. Subsequently, being unable to meet the first bill at maturity, A handed the plaintiffs the storage receipt for the cornsacks as security, and made a similar arrangement as regards the second bill. Before the third bill became due, A—being then in insolvent circumstances—arranged that the plaintiff should take back the cornsacks, and the original sale be rescinded.

The third bill was then in the hands of the plaintiffs' bankers for discount; and the plaintiffs accordingly, before the bill became due, instructed their bankers to pass the amount to their debit, which was accordingly done, the plaintiffs' account being at the time overdrawn.

Shortly after this arrangement A made an assignment under Division VI. of the Insolvent Act, 1860, of his estate and effects to the defendants as trustees, for the benefit of his creditors, and the cornsacks still remaining in the warehouse in A's name were taken possession of by the defendants.

On action for the value of the cornsacks, evidence was given of a custom existing in free warehouses at Port Adelaide to hand the goods named in their storage receipt to the holder of such receipt; and the jury found a usage as regards goods stored in such warehouses that they should be sold without notice to the warehouseman.

Held—GWYNNE, J., *dissentiente*—That there was a payment within the statute.

That the goods were not, at the date of the assignment, in the order and disposition of A.

That the finding of the jury was not against the weight of evidence.

Quære—Whether the order and disposition clauses of the Insolvent Act, 1860, apply to deeds of assignment?

Per STOW, J.—The custom established, as regards goods of other persons in warehouses to take them out of the order and disposition of the insolvent in whose name they stand, must be the custom of the place where the goods are stored—not of the insolvent, nor of the place where his business is carried on.

MURRAY V. ACRAMAN. 179

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LANDS CLAUSES CONSOLIDATION ACT, 1847.—*Offer—Notice of Trial—Costs.* Under Section 52 of the Lands Clauses Consolidation Act of 1847 it is sufficient if the offer be made at the same time as the notice of enquiry is given in order to disentitle the claimant to costs in the event of the amount of compensation awarded being less than the amount offered.

BOORD v. COMMISSIONER OF WATERWORKS. 33

LOCAL COURT, BAILIFF OF.—See APPEAL.

MARINE BOARD ACT, No. 6 OF 1873.—See MERCHANT SHIPPING ACTS.

MARRIAGE.—See DISSOLUTION.

MEMORANDUM OF ASSOCIATION.—See COMPANY.

MERCHANT SHIPPING ACTS, 17 *and* 18 *and* 25 *and* 26 *Victoria.*—*Marine Board Act, No.* 6, 1873—*Cancellation of Certificate—Tribunal.* By Section 242 of the Merchant Shipping Act, 17 and 18 Vic., power is given to the Board of Trade to cancel certificates of masters and mates in certain cases, which power is—by Section 23 of 25 and 26 Vic, c. 63—vested in the "Local Marine Board Magistrates, Naval Court, Admiralty Court, or other Court or tribunal by which the case is investigated or tried."

By Section 13 of The Marine Board Amendment Act, No. 6 of 1873, power is given to the Marine Board to appoint persons, with the assistance of the Stipendiary Magistrate for the place; or, if there be no such Stipendiary Magistrate, with the assistance of a competent legal assistant, to be appointed by the Treasurer, to enquire into any charge of incompetency or misconduct made against any master, mate, or engineer, which tribunal is empowered by the same Act to cancel or suspend the certificate of such master, &c.

Certain charges having been preferred against the master of a vessel, the Marine Board—one of its members having been appointed a Special Magistrate for purposes of the Marine Board Act of 1860—appointed themselves a tribunal to investigate such charges, and as such tribunal cancelled the master's certificate.

Held—1. That the tribunal contemplated by the Merchant Shipping Act was a tribunal appointed by the local Legislature, who had no power to delegate their authority to appoint such tribunal to the Marine Board.

2. That the 15th Section of the Marine Board Amendment Act, 1873, negatived the right of the Marine Board to sit as a tribunal in the matter, and disentitled them to appoint themselves as such tribunal.

MADGE v. FERGUSON AND OTHERS. 216

METER.—See ADELAIDE WATERWORKS ACT, 1863.

MISDIRECTION.—See NEW TRIAL.

MORTGAGE.—See REAL PROPERTY ACT, 1861.

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NEW TRIAL.—*Misdirection—Acquiescence by Counsel in Judge's direction—Estoppel.* Where at the trial of an action Counsel have raised no objection to the direction of the presiding Judge on the law involved, they are estopped from afterwards objecting to the same where the Counsel for the other side have been led by such direction to frame their case in a manner different from that which they would otherwise have adopted, especially if such direction be in accordance with the opening to the jury of the Counsel so afterwards objecting.

RANDALL v. TUXFORD. 1

NOTICE.—See REAL PROPERTY ACT, 1861 (1).

——— OF DISHONOUR.—See COMPANIES ACT, 1864.

——— TRIAL.—See LANDS CLAUSES CONSOLIDATION ACT, 1847.

OFFER.—See LANDS CLAUSES CONSOLIDATION ACT, 1847.

ONUS PROBANDI.—See COMPANY.

ORDER.—See EQUITY ACT, 1866-7.

——— INSOLVENT ACT, 1860 (2).

——— AND DISPOSITION.—See INSOLVENT ACT, 1860 (4).

——— STORAGE RECEIPT.

ORDERS, CHEQUES OR.—See COMPANIES ACT, 1864.

PARTY TO CAUSE.—See APPEAL (1).

PAYMENT.—See INSOLVENT ACT, 1860 (4).

——— OF RENT.—See REAL PROPERTY ACT, 1861 (2).

——— TIME FOR.—See APPEAL.

POSSESSION.—See STORAGE RECEIPT.

PREFERENTIAL SHARES.—See COMPANY.

PRINCIPAL.—See COMPANY.

REAL ESTATE.—See ADMINISTRATOR.

REAL PROPERTY ACT, 1861.—1.—*Mortgage—Notice—Specific Performance—Damages.* A mortgage of land under the provisions of the Real Property Act of 1861 provided that it should be lawful for the mortgagee to sell the mortgaged land on default "without serving me (the mortgagor) with any written demand for payment."

A subsequent clause provided "that all notices which, by virtue of the Real Property Act of 1861, whether in respect of the payment of any money or otherwise, would require to be served by the said mortgagee on me at my last known or usual place of abode in this province, shall be deemed to be duly served by sending to me through the Post Office a letter addressed to me at Mount Gambier."

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The land having been sold without giving the notice provided by Section 52 of the Real Property Act of 1861,

On Bill filed by the mortgagor, praying that the sale and transfer might be set aside, or for damages,

Held—That the mortgage did not dispense with the necessity of giving the notices required by the Real Property Act, but only with the mode of giving them there provided; and that the sale was therefore improper, but that the transferee was protected by the Real Property Act as a *bona fide* purchaser.

That the Bill, showing no claim to equitable relief, irrespective of the question of damages, the Court of Equity would not entertain that question.

VAN DAMME v. BLOXAM. 27

REAL PROPERTY ACT, 1861.—2. *Tenant in Possession—Trespasser—Agreement—Payment of Rent.* A tenant in possession under an agreement with a person who subsequently obtains a clean certificate of the land in respect of which such agreement is made becomes a trespasser as against such person, until a fresh tenancy is created by possession and payment of rent.

HUNTER v. PLAYER. 100

RENT, PAYMENT.—See REAL PROPERTY ACT, 1861 (2).

REVIVAL.—See DISSOLUTION OF MARRIAGE.

REVIVOR.—See EQUITY ACT, 1866-7.

SERVICE.—See EQUITY ACT, 1866-7.

SHARES, PREFERENTIAL.—See COMPANY.

SPECIAL.—See GENERAL DEMURRER.

SPECIFIC PERFORMANCE.—See REAL PROPERTY ACT, 1861 (1).

STORAGE RECEIPT.—*Order and Disposition—Delivery—Possession—Insolvency.* The delivery of a storage receipt, standing in the name of the person delivering and transferring such receipt, does not operate as a delivery of possession, so as to take the goods out of the order and disposition of the person in whose name they stand, unless proof be given of a general custom on the part of purchasers of such goods to allow the same still to remain in such warehouse in the name of the vendor after completion of sale.

The plaintiff sold to A certain goods, receiving in payment three bills of exchange, payable at different dates.

The goods were delivered to a warehouseman on A's account, and a storage receipt forwarded to him.

Before the first bill became due, the plaintiffs renewed same at A's request, he endorsing to them the storage receipt as security; and the second bill was also renewed before maturity, and the storage receipt held as security for that bill also.

Before the third bill became due, the plaintiffs agreed, at A's request, to take back the goods, and retire the bills which had been

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endorsed by them to their bankers; and the plaintiffs accordingly instructed their bankers to pass the amount of the bills to their debit without presentment, but the bills themselves were not returned to A.

On action by the plaintiffs against the trustees of A's estate, under a deed made under Division VI. of the Insolvent Act, 1860, for the value of the cornsacks,

Held—per HANSON, C.J., and STOW, J.—That the delivery of the storage receipt was not a delivery of the goods, but that the retirement of the bill by the plaintiffs was such a payment as to satisfy the Statute of Frauds.

That the goods were in the order and disposition of A.

Per GWYNNE, J.—That the retirement of the bills by the plaintiffs was a retirement on their own account, and necessary to enable them to carry out their agreement with A, but that A was not released from his liabilities on the bills, and that such retirement did not amount to payment within meaning of the Statute.

MURRAY AND OTHERS v. ACRAMAN AND OTHERS. 69

TENANT IN POSSESSION.—See REAL PROPERTY ACT, 1861 (2).

TITLE, WARRANTY OF.—See AGREEMENT.

TRESPASS.—See REAL PROPERTY ACT, 1861 (2).

TRIBUNAL.—See MERCHANT SHIPPING ACTS.

TROVER.—See INSOLVENT ACT, 1860 (4).

WAREHOUSEMEN, CUSTOM OF.—See INSOLVENT ACT, 1860 (3).

WARRANT.—See INSOLVENT ACT, 1860 (3).

WARRANTY OF TITLE.—See AGREEMENT.

WILL.—1.—*Construction—Effects.* A testator by his will, after devising a section of land to each of two sons and bequeathing a sum of money to a third son, then continued:—"And to Susannah, my beloved wife, I give the residue of all my goods, cattle, chattels, and other effects, and I appoint her my sole executrix."

Held—That the residuary realty did not pass under the above residuary bequest.

FORREST v. FORREST. 103

———2.—See APPEAL.

Printed by Marchant & Co. Pty., Ltd., Sydney.